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Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

SNOHOMISH COUNTY; STEPHEN HOLT, Director, Snohomish County Department of Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON; THE TULALIP TRIBES OF WASHINGTON,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the express *in rem* jurisdiction over reservation fee lands established by Congress in sections 5 and 6 of the Indian General Allotment Act (as amended and codified at 25 U.S.C. §§ 348 and 349) and recognized by this Court in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), allows Snohomish County to zone or impose any land use regulations against fee land located on the Tulalip Indian Reservation when the land is owned by a member of the Tulalip Tribes.

2. Whether, in light of the diminished tribal authority over reservation fee lands recognized by this Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), and the minimal federal and tribal interests in maintaining exclusive tribal jurisdiction over private open-market development, the legitimate regulatory interests of state and local government allow Snohomish County to zone or impose any land use regulations against Reservation fee lands or tribal members developing those lands when the land is owned by a member of the Tulalip Tribes.

PARTIES TO THE PROCEEDING

The petitioners are Snohomish County and Stephen Holt, Director, Snohomish County Department of Planning and Development Services. There are no parent companies or wholly owned subsidiaries.

The respondents are The Tulalip Tribes of Washington; Kim Gobin; and Guy Madison.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Snohomish County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-19a) is reported at 304 F.3d 909. The opinion of the district

court (App. *infra*, 22a-31a) and the judgment of the district court (App., *infra*, 20a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 5 and 6 of the Indian General Allotment Act of 1887, 24 Stat. 389-90, as amended by the Burke Act of 1906, 34 Stat. 182, codified at 25 U.S.C. §§ 348 and 349, are reproduced at App., *infra*, 39a-41a and 42a. The relevant Indian treaty is the Treaty of Point Elliot, 12 Stat. 927 (Jan. 22, 1855), which is reproduced at App. *infra*, 32a-38a.

STATEMENT

This case raises the important question of whether and to what extent state and local governments have authority to zone or impose land use regulations on reservation fee lands when tribal members own those lands in unrestricted fee simple. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1362 (federal question jurisdiction in civil actions brought by Indian tribes).

A. The Land and Its Surroundings

The fee land at issue in this case is a twenty-acre parcel situated in unincorporated Snohomish County in

northwestern Washington State. It lies on the northern border of the Tulalip Indian Reservation and is currently owned by Kim Gobin, an enrolled member of the Tulalip Tribes of Washington (the "Tribes").

The Tribes is a federally recognized tribe with a 22,000-acre reservation set aside for its "exclusive use" under the Treaty of Point Elliot. 12 Stat. 927; App., *infra*, 33a. Similar to what has happened on many reservations throughout the United States, however, much of the Tulalip Reservation is no longer preserved for exclusive tribal use. Large portions of the Reservation were allotted to individual Indians subject to restrictions on alienation, encumbrance and taxation that were later removed, and much of the land allotted to individual Indians was later sold to non-Indians.

Currently, about 50% of the Reservation is held in trust by the United States for the Tribes or individual tribal members or is in restricted fee status because the Tribes repurchased the land after its transfer to non-Indians.[1] The remaining 50% of the Reservation is owned by tribal members and nonmembers in unrestricted fee simple. Land ownership throughout the Reservation is in a checkerboard pattern, with open access provided to members and non-members on a road system operated and maintained by Snohomish County. C.A. Excerpt 85 at 5.

As the area has evolved, the Reservation has become an integral part of Snohomish County and is subject to the same urban sprawl growth pressures as the surrounding metropolitan area. C.A. Excerpt 71 at 2. The Reservation is located entirely within Snohomish County between the County's major population centers, the cities of Everett, Marysville, and Arlington. Approximately 10,000 people currently live on the Reservation, and of those, no more than 20% are tribal members with the remaining 80% being non-

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[1] Under 25 U.S.C. § 403a-2, land purchased by the Tribes after June 18, 1956 is restricted fee land because it may be sold only with approval from the Secretary of the Interior.

members. All Reservation residents may vote in County elections while only tribal members may vote in elections for the Tribes. C.A. Excerpt 85 at 2-3.

Gobin's land is located on the northern border of the Reservation. It is adjacent to off-reservation land under County jurisdiction and is accessible only by a road operated and maintained by the County. C.A. Excerpt 71 at 112-14. It was patented under the Treaty of Point Elliot in 1885, and restrictions on its sale, encumbrance and taxation were removed in 1962 when the Secretary of the Interior approved a deed to a non-Indian owner. Gobin purchased her twenty-acre parcel for speculative land development in 1998. C.A. Excerpt 64 at 2-3.

B. Land Use Regulation on the Reservation

The County and the Tribes each have a comprehensive ordinance governing zoning and land use on the Reservation. By its terms, the Tulalip ordinance applies to all lands within Reservation boundaries whether trust or fee and regardless of ownership. C.A. Excerpt 71 at 56, 80. The Secretary of the Interior approved the Tulalip ordinance using a "narrow scope of review" without determining "the precise scope of tribal authority or . . . whether every conceivable application of [the] ordinance is within that authority." Docket 71 at 82, 84.

The County ordinance applies to all real property in unincorporated Snohomish County, although the County historically has not asserted land use jurisdiction on Indian trust lands. On unrestricted Reservation fee lands, the County historically has exercised its zoning and land use jurisdiction against the land and its owners without reference to tribal affiliation. C.A. Excerpt 85 at 4.

The County and the Tribes have zoned the Reservation in similar ways. C.A. Excerpt 84 at 88. In adopting its most recent countywide land use plan, the

County established a sub-area plan specific to the Reservation and, at the request of the Tribes, down zoned the Reservation to lower densities to more closely match tribal zoning. C.A. Excerpt 85 at 10. A distinction remains, however, in the ability of each government to approve development different than what is allowed by the basic zoning map. The Tulalip ordinance allows the Tribes to approve a re-zone and subdivision for single-family residences in greater density than is possible under the current County ordinance.

C. Gobin's Project

In January 1999, Gobin submitted an application to the Tribes to subdivide and re-zone her land but never submitted a similar application to the County. When the Tribes notified the County of the application, the County stated that, unless the land were taken into trust, the County would assert jurisdiction, would not recognize subdivided lots as legal lots, and would subject non-legal lots to development restrictions. C.A. Excerpt 71 at 123-24.

As approved by the Tribes, Gobin's subdivision consists of twenty-five single-family residential lots on individual wells and septic systems. Current County ordinances would allow only ten such lots on the same parcel of land.

Other than permitting Gobin's residential subdivision, the Tribes has no governmental or proprietary interest in Gobin's land or her project. Gobin does not propose to build tribal housing, but to develop twenty-five single-family residences for the open market. C.A. Excerpt 64 at 2. Based on current growth trends in the County and the number of non-member residents on the Reservation and surrounding areas, it is probable that non-members will purchase most if not all homes in any such open-market development. *See* C.A. Excerpt 85 at 2-3.

In September 1999, Gobin[2] filed a complaint for declaratory relief against the County and Stephen Holt, the County Director of Planning and Development Services. The complaint alleged that the County has no jurisdiction over fee land owned by Gobin or to enforce restrictions against her based on her development of that land because she is an enrolled member of the Tribes. In October 1999, the Tribes intervened and sought a judgment declaring that the Tribes has exclusive jurisdiction over Gobin's development activities on the Reservation.

D. Proceedings Below

On summary judgment motions from Gobin and the Tribes, the District Court entered a judgment declaring that the Tribes has exclusive jurisdiction to regulate land use on reservation fee lands owned by tribal members. The Ninth Circuit affirmed. In answering the questions presented, each court applied the standard set forth in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-216 (1987), which recognizes state jurisdiction over tribal Indians on their reservations only when Congress expressly provides for it or in the exceptional circumstance that state interests outweigh federal and tribal interests in tribal self-determination, self-sufficiency, and economic development. In resisting summary judgment, the County relied on both express jurisdiction and exceptional circumstances. The County argued that Congress expressly granted state and local governments *in rem* jurisdiction on reservation fee lands and that, under the exceptional circumstances test, the County may exercise jurisdiction concurrent with that of the Tribes over its members. At a minimum, the County sought

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[2] Gobin's brother, Guy Madison, is also a named plaintiff even though he is alleged to be a co-developer only and has no interest in the land at issue in this case. C.A. Excerpt 64 at 1-2.

a weighing of the state, federal and tribal interests at stake after a trial on the merits.

In arguing that Congress granted express jurisdiction over reservation fee lands, the County relied upon the *in rem* jurisdiction established under sections 5 and 6 of the Indian General Allotment Act (GAA) and recognized by this Court in the context of taxation in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In rejecting the County's argument, the District Court held that the *in rem* jurisdiction that Congress authorized by allowing unrestricted alienation, encumbrance and taxation of fee land does not include zoning or any land use regulation regardless of whether it is imposed against the land or the owner because all such regulations have an effect of limiting the owner's development activity. The Ninth Circuit upheld this holding by using slightly different reasoning. It held that Congress did not authorize jurisdiction because the ability to alienate land is unrelated to land use jurisdiction and the ability to encumber land does not authorize regulation that burdens activity on the land.

In contending that this case presents an exceptional circumstance, or that this determination must be made after trial, the County emphasized that tribal interests must be examined in light of the diminished tribal authority over reservation fee lands recognized by the Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The County also emphasized the minimal federal and tribal interests in maintaining exclusive tribal jurisdiction over private development, and the serious administrative and practical problems posed when exclusive jurisdiction shifts between the Tribes and the County based upon whether a tribal member owns the land at any given time.

In rejecting the County position, the District Court and the Ninth Circuit recognized that the County has legitimate and important interests at stake—maintaining

County roads and storm sewers, protecting endangered species, and protecting public health and safety—but held that tribal interests in self-government are of greater importance. In so holding, neither court discussed whether tribal authority is diminished on fee lands. Other than stating that county and tribal regulations may differ, neither Court discussed how county regulation of private development would interfere with tribal self-determination. Neither court discussed whether County interests were sufficient to sustain less than plenary jurisdiction, such as allowing the County to enforce development restrictions *in rem* against fee land, but not against owners that are tribal members, or allowing County enforcement against the land owner if the land is subsequently transferred to a non-Indian owner again. In contrast, and without reference to federal or tribal interests, each court held that to maintain any jurisdiction over member-owned fee land, the County must somehow demonstrate that its governmental interests on fee lands as a whole are greater than its interests on Indian trust lands.

REASONS FOR GRANTING THE PETITION

This case presents the critical question of whether state and local governments have any authority to zone or impose land use regulations on reservation fee lands when a tribal member owns those lands. In conjunction with this Court's decision in *Brendale*, the consequence of the Ninth Circuit's decision is that exclusive zoning and land use jurisdiction over individual parcels of reservation fee land will shift between local and tribal government based upon whether a member or non-member owns the land at any given moment. This Court should review the decision of the Ninth Circuit because: (1) it conflicts with the express *in rem* jurisdiction granted to state and local governments over reservation fee lands recognized by this Court's decision in *County of Yakima*; (2) it misapplies and rewrites this Court's

exceptional circumstances jurisprudence by failing to consider whether tribal sovereignty on fee lands is diminished and the nature and extent of federal and tribal interests in maintaining exclusive tribal jurisdiction over private development; and (3) it creates a broad and unworkable rule of law that will cause serious zoning and land use enforcement problems for states, counties, and Indian tribes throughout the country.

A. The Court of Appeals Decision Conflicts with Principles of *In Rem* Jurisdiction on Fee Land Established in *County of Yakima.*

In *County of Yakima*, the Court considered whether a county could impose both an *ad valorem* property tax on land patented under the General Allotment Act as well as an excise tax on its sale. In upholding the *ad valorem* property tax, but not the excise tax, the Court held that GAA sections 5 and 6, each independently, manifested an unmistakably clear intent to allow states to tax fee-patented land based on *in rem* jurisdiction over the land. *County of Yakima*, 502 U.S. at 259, 263-65. The Court held that GAA section 5 manifested such intent by allowing fee owners to alienate their reservation fee land without restriction, and that GAA section 6 (as amended by the Burke Act) manifested such intent by establishing that fee ownership would free the land of "all restrictions as to sale, incumbrance, or taxation." *County of Yakima*, 502 U.S. at 563-65 (quoting 25 U.S.C. § 349); *see also Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 112 (1998) (discussing *County of Yakima*). The Court held that GAA sections 5 and 6 each establish *in rem* jurisdiction over reservation fee land, but specifically left open the extent of that jurisdiction:

> While the Burke Act proviso does not purport to describe the entire range of *in rem* jurisdiction States may exercise with respect to fee-patented reservation land, we think it does describe the entire range of *jurisdiction to tax*. And that description is "taxation of . . . land."

County of Yakima, 502 U.S. at 268.

In the context of this case, the reserved questions raised by the quoted passage are (1) whether alienability under GAA section 5 allows the County to zone or impose other land use regulations *in rem* against the land, as opposed to *in personam* against the landowner or developer, and (2) whether such a zoning or other land use regulation is an authorized encumbrance of land under GAA section 6. Other than this case, there appears to be no federal authority answering these questions. By answering both questions in the negative, the decision of the Court of Appeals conflicts with the reasoning and import of *County of Yakima* and *Goudy v. Meath*, 203 U.S. 146 (1906).

As to the first question, the *County of Yakima* Court emphasized the reasoning from *Goudy* that a county's ability to tax fee land flows directly from its alienability because it would be "strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [sic] from taxation." *County of Yakima*, 502 U.S. at 263 (quoting *Goudy*, 203 U.S. at 149). As the Ninth Circuit has recognized, "[t]he logic propounded by the *Goudy* Court and approved by [*County of Yakima*] requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership." *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1357 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

The reasoning that requires the burden of *in rem* taxation to follow the benefits of unrestricted land ownership

applies equally to *in rem* zoning and land use restrictions. Just as it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from taxation, it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from zoning and development restrictions that apply to all other lands on the open market. In refusing to apply this reasoning from *County of Yakima*, the Court of Appeals specifically noted that it had been reluctant to apply it even in the context of taxation. 304 F.3d 909, 915 n.2.[3] The Court should grant the petition to determine this important and outstanding question of federal law.

On the second question, whether zoning or land use restrictions are an encumbrance of land, the Court of Appeals decision misconstrues and misapplies the reasoning in *County of Yakima*. In *County of Yakima*, the Court held that an *ad valorem* property tax is an allowed taxation of land while an excise tax on the activity of selling land is not a tax on the land itself, and therefore is not permitted. In this case, the Court of Appeals reasoned that, even if zoning and land use regulation may be considered an encumbrance, it must be considered a prohibited encumbrance on activity with respect to land rather than a permitted encumbrance of the land itself because such regulations prohibit development activity. What this reasoning ignores is that land use ordinances often regulate the condition of the land itself and authorize enforcement against the land without reference to persons.

In the context of determining whether a county zoning ordinance is a prohibited encumbrance of reservation trust lands, the Ninth Circuit itself has held that zoning may be understood as an encumbrance of land rather than an

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[3] The Court of Appeals cites its comment from *Lummi Indian Tribe* that the conclusion from *County of Yakima* that taxation follows alienability under GAA section 5 "may be hard to square with the requirement" "that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *See Lummi*, 5 F.3d at 1358.

encumbrance of activity on the land. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). In so holding, the Ninth Circuit dismissed arguments that its interpretation of zoning regulations as encumbrances could be read more broadly:

> As we read "encumbrance," it is directed, consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only incidentally involve the property.

Santa Rosa Band, 532 F.2d at 667 n.20. What the County contends in this case is that regulation directed at the condition of the land, such as an *in rem* zoning ordinance enforceable only through *in rem* abatement proceedings, is an authorized encumbrance of the land. It is not a restriction on development activity itself but on the condition of the land whether it is developed or not and regardless of who conducts activity on the land.

By basing its reasoning on the tribal member as the actor in developing member-owned fee land, the decision below also conflicts with *Brendale*. *Brendale* held that a tribe has no authority to zone non-member-owned fee land in open areas of a reservation. 492 U.S. at 432, 444-48. Contrary to that holding, the reasoning employed by the Ninth Circuit supports exclusive tribal authority over land use activities of tribal member developers on non-member-owned fee land. The Court should grant the petition to determine this important legal issue.

B. The Court of Appeals Misconstrues and Misapplies the Exceptional Circumstances Test.

As articulated by this Court, the exceptional circumstances test asks whether state jurisdiction interferes or is incompatible with federal and tribal interests, and if it is, whether the state interests at stake are sufficient to justify the assertion of state authority. *Cabazon Band*, 480 U.S. at 216 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)). In answering these questions, this Court has emphasized that federal and tribal interests must be viewed in light of traditional notions of Indian sovereignty and the congressional goals of encouraging tribal self-determination, self-sufficiency, and economic development. *Cabazon Band*, 480 U.S. at 216; *Mescalero Appache Tribe*, 462 U.S. at 335. This Court has held repeatedly that this determination is context specific, does not depend on absolute conceptions of state or tribal sovereignty, and requires a particularized inquiry into the nature of the state, federal, and tribal interests at stake. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Mescalero Apache Tribe*, 462 U.S. at 333 (1983); *Rice v. Rehner*, 463 U.S. 713, 718-720 (1983); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994).

In the decision below, the Ninth Circuit ignores the exceptional circumstance jurisprudence of this Court by failing to discuss the nature of tribal sovereignty on unrestricted fee lands and by failing to discuss how County jurisdiction would impact actual federal and tribal interests in the regulation of private development on those lands. What is most exceptional about this case is that federal and tribal interests in exclusive jurisdiction are almost nonexistent. In essence, the Ninth Circuit has held that the concept of tribal sovereignty, in itself, will always trump legitimate state

interests in the face of any potential conflict between state and tribal regulation that affects tribal members on a reservation. By failing to even consider the nature and extent of federal and tribal interests, the Ninth Circuit has done away with the particularized inquiry into the various state, federal, and tribal interests that is mandated by the decisions of this Court.

1. Diminished Tribal Sovereignty

Contrary to the opinions of this Court, the Court of Appeals applies an absolute concept of tribal sovereignty that makes no distinction between tribal authority on fee versus trust lands. This Court has held that tribes retain a measure of sovereignty over their members and their territory. *United States v. Mazurie*, 419 U.S. 544, 547 (1975) (citing *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 557 (1832)). This Court has also held, however, that this sovereignty "is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance*." *Rice v. Rehner*, 463 U.S. at 719 (emphasis in original). As a result of congressional allotment policies, which resulted in large portions of many reservations becoming freely transferable between Indians and non-Indians, the Court has recognized that tribal authority is diminished on fee lands. *See Brendale*, 492 U.S. 408; *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165 (1977) (stating that land alienated in fee simple is no longer retained for "exclusive use" under treaty language).

In *Brendale*, both the lead and concurring opinions recognize that tribal authority to impose zoning restrictions is diminished on reservation fee lands. The holding that a tribe retains no authority to zone non-member-owned land in open areas is based on the premise that a tribe loses its inherent authority to exclude fee landowners from the reservation. *See* 492 U.S. at 424-28 (opinion of White, J.); 492 U.S. at

435-37 (opinion of Stevens, J.). Although the holding is limited to lands owned by non-members, the limitations on tribal authority are stated in broader terms. In the concurring opinion, Justice Stevens states that, although the General Allotment Act did not, on its own, transfer regulatory authority from tribes to states, "by providing for the allotment and ultimate alienation of reservation land, the Act in some respects diminished tribal authority." 492 U.S. at 436. In the lead opinion, Justice White states that "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" and that "the county has jurisdiction to zone fee lands on the reservation." 492 U.S. at 430, 431.

The opinion below does not even cite *Brendale* much less discuss whether tribal sovereignty is diminished on fee lands. In a single sentence, without citation to authority, the Court of Appeals goes in the opposite direction and holds the County to a higher standard on fee lands. "Not only must the County explain why [its] interests are exceptional, but it must explain why [its] interests are exceptional for reservation *fee* lands, given the County's inability to regulate reservation lands held in trust." 304 F.3d at 917; App., *infra*, at 18a. Such a standard is at odds with the opinions of this Court and creates a legally impossible burden for states and local governments. As an example, the stated rule would require the County to show that a nuclear waste disposal site located on member-owned fee land would create a greater hazard to County interests than the same disposal site would if located next door on reservation trust land. No set of circumstances, no matter how dire for state or local government interests, can satisfy the test stated by the Court of Appeals. Such a test is contrary to this Court's decisions and cannot be upheld.

2. No Tribal Interests In Open Development

In discussing tribal interests, the Court of Appeals

relies exclusively on tribal interests in self-government.[4] The reasoning in the opinion below is limited to stating that, because County ordinances differ from those of the Tribes, the County cannot exercise any measure of its zoning or land use authority over member-owned fee lands. In so holding, the decision is at odds with the Court's opinion in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155-56 (1980).

In *Colville*, the Court considered whether tribal involvement in the sale and taxation of cigarettes prevented a state from imposing a tax on cigarettes sold to non-members that tribal members were required to collect. The Court held that tribal interests in self-determination did not justify granting an artificial competitive advantage to tribal enterprises selling goods to nonmembers on reservations, and upheld the state collection requirement. 447 U.S. at 155-56; *see also Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-82 (1976) (upholding similar tax).

Similar to the position rejected in *Colville*, the decision of the Court of Appeals grants tribal members an artificial competitive advantage in the residential housing market that bears no relation to tribal interests in self-government. The decision allows tribal members to purchase a fee parcel, subdivide it into more residential lots than a non-member could under County ordinances, and re-sell the greater number of subdivided lots to non-members on the

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[4] The Court of Appeals did not base its holding upon tribal interests in self-sufficiency or economic development, and rightly so. Unlike the tribal bingo enterprise in *Cabazon* or the fish and game management program in *Mescalero Apache Tribe*, Gobin's proposed subdivision is a purely private endeavor with no tribal or federal involvement beyond the permitting process. It is not a tribal housing project and provides no business income or benefit to the Tribes. And unlike the county-approved development in *Brendale*, requiring compliance with County zoning and land use restrictions would pose less danger to tribal resources than allowing the greater density permitted by the Tribes.

open market. The decision not only prohibits the County from enforcing restrictions against tribal members, but also from imposing zoning or land use requirements on the land in the first instance. As a result, the County is forced to recognize subdivisions permitted by the Tribes on member-owned land regardless of whether the subdivided lots are sold to non-members. In the absence of tribal involvement in the project for a governmental purpose such as tribal housing, *see Cabazon*,[5] 480 U.S. at 214-220, this is exactly the unfair competitive advantage that the Court condemned in *Colville* and *Moe*.

The Court of Appeals also ignores all remedies other than a complete bar to County jurisdiction. It discusses only plenary County jurisdiction and dismisses out of hand the less intrusive remedies of allowing *in rem* jurisdiction against fee land or allowing County enforcement against the landowner once the land is transferred to a non-member of the Tribes. In discussing exceptional circumstances, the Court of Appeals says little more than that plenary County jurisdiction is greater than the "minimal burden" on tribal self-government approved in *Moe*. 304 F.3d at 918; App., *infra*, at 19a. No basis or analysis is provided for such a sweeping conclusion. In light of the established fact that the more restrictive County zoning was enacted at the specific request of the Tribes, and will continue to apply to non-members under this Court's decision in *Brendale*, it is difficult to ascertain any interest of the Tribes in permitting greater development other than to create a competitive advantage for its members in marketing reservation lands to the general public. Under the decisions of this Court, the Tribes cannot claim any interest in assuring that lots in a member-owned subdivision are recognized as legal lots once

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[5] In *Cabazon*, the Court held that a tribal gaming enterprise that is approved by the federal government, provides employment to tribal members, and is the sole source of tribal revenue is not just marketing an exemption from state gambling laws.

the lots are transferred to a non-member. *See Rice v. Rehner*, 463 U.S. at 721 (application of state liquor laws to federal Indian trader implicates tribal sovereignty only with respect to sales to tribal members).

What is most telling about the extent of the Tribes' interest in this case is the impact if this case were reversed and the County were allowed to exercise land use jurisdiction on reservation fee lands concurrent with that of the Tribes over its members. Under relevant case law, the Tribes will continue to have vast sovereign powers with respect to its members and its territory. The Tribes will be able to exercise plenary land use authority over lands held in trust for its own use or the use of its members, as well as the lands held in restricted fee status. *See Brendale*, 492 U.S. at 445; *Santa Rosa Band*, 532 F.2d. 655. It will be able to regulate the activities of its members in developing reservation fee lands. It will be able to regulate the activities of non-members on fee lands in any closed area of its Reservation, *Brendale*, 492 U.S. at 444, and restrict Reservation development permitted by the County on Reservation fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Brendale*, 492 U.S. at 428. Depending upon the nature of state and local government interests involved, it also may have authority to permit development on fee lands with a governmental purpose despite contrary County zoning or land use regulations. *See Cabazon*, 480 U.S. at 214-220 (federal and tribal interests in promoting tribal gaming preempted state gambling laws). The only clear impact to the Tribes if this case were reversed is that it would not be able to exempt private development by its members on fee land from the zoning and land use regulations of the County.

C. The Court of Appeals Decision Creates Serious Problems for States, Counties, and Tribes.

Although the County does not know how much reservation fee land is owned by tribal members, it is clear that a great percentage and millions of acres of allotted lands were fee patented, *see* F. Cohen, Handbook of Federal Indian Law 138 (1982), and that this resulted in vast portions of reservations across the United States becoming unrestricted fee lands, *see, e.g., Brendale*, 492 U.S. at 416 (almost half of land in open area of Yakima Reservation is fee land); *Cass County*, 524 U.S. at 108 (fee land as much as ninety-five percent of the Leech Lake Reservation, Minnesota). The rule established by the Court of Appeals creates an unworkable administrative nightmare for every state, local, and tribal government jurisdiction that contains reservation fee lands.

In conjunction with *Brendale*, the rule established by the Court of Appeals results in exclusive zoning and land use jurisdiction shifting between local and tribal governments based upon whether a member or non-member owns the land at any given time. As a general proposition, this Court has recognized that administrative problems will follow such a system. *County of Yakima*, 502 U.S. at 265 (allowing "state taxation of only those fee lands owned (from time to time) by nonmembers" produces a "'checkerboard,' and one that is less readily administered"); *see also Brendale*, 492 U.S. at 430 (White, J.) (zoning authority switching between County and Tribe depending on permitted uses "would not further the interests of either the Tribe or the county government and would be chaotic for landowners").

One of the most troubling aspects of the decision below is that it allows private parties to choose between the land use ordinances of the local and tribal governments based on the ability to alienate land without restriction. Merely by transferring title to a person with the appropriate tribal affiliation, a private developer may choose the forum that

will provide the desired result for any given fee parcel. The more serious aspect of this problem is that it allows private parties to enter into sham transactions for the specific purpose of avoiding enforcement by either or both the local and tribal government. On reservations where the resident tribe has no land use code, or no ability to enforce its code, a private developer would be able to avoid enforcement of zoning and land use restrictions simply by transferring title to a tribal member.[6] On reservations where the resident tribe enforces its code, a developer would be able to avoid enforcement by transferring property between members and non-members.

The Court of Appeals dismisses this serious threat to effective enforcement as nothing more than a problem "best handled jointly by the County and the Tribes in furtherance of their already excellent relationship." 304 F.3d at 909. What the Court of Appeals fails to recognize is that neither a county nor a tribe may confer jurisdiction on the other by agreement. There is no administrative solution to the problem created by the Court of Appeals' decision.

The record in this case contains a concrete example of the problem that sham transactions present. On the Tulalip Reservation, Ralph Merkel is a non-member of the Tribes who owned a trailer park that violates both county and tribal land use ordinances. When the County brought an enforcement action, Merkel raised a jurisdictional defense based upon various purported property transfers including, ultimately, a transfer to Marvin Napoleon, an enrolled member of the Tribes. C.A. Excerpt 84 at 51-53, 110-113; 48 at 2-3. Merkel filed a federal action against the County to block County enforcement, and after the District Court entered the summary judgment order in this case, the County

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[6] In this case, the Tribes employed no building inspectors until after the case was filed, and approved homes built by Gobin in a previous subdivision based on partial, after-the-fact inspections. C.A. Excerpt 85 at 13-14; 48 at 7-12; 84 at 104-05.

entered into a stipulated dismissal of both the enforcement action and the federal lawsuit. App., *infra*, 43a-47a. As far as the County is aware, the Tribes has not taken any enforcement action against Merkel, Napoleon, or the trailer park property, and Merkel continues to operate it in violation of the land use ordinances of both the County and the Tribes.

The problem of determining whether a tribal member owns fee land, and potential civil rights liability, further threatens effective enforcement. A county can determine its jurisdiction on trust and restricted fee lands by examining record title, but record title does not establish whether or not an owner is a tribal member. Even if a local government can establish that the record titleholder is not a tribal member, it cannot be assured that a tribal member does or does not have a legal interest in the property. Many property transfers are not recorded for various reasons, which will now include the incentive to avoid land use enforcement action by the county or tribal government that would acquire jurisdiction from the transfer. The problem is exacerbated by the possibility of divided ownership. As an example, in Washington and other community property states, a tribal member spouse may have a legal interest in the property that is not indicated on the title. *See, e.g., Washington Trust Co. v. Blalock*, 155 Wash. 510, 515, 285 P. 449, 451, (1930) (title to community property may be taken in the name or either spouse, or both, or part in name of each). It is therefore likely that the rule established by the Court of Appeals will result in under-enforcement either because unclear title will present an unwarranted enforcement risk or clear but inaccurate title will convince the local government that it does not have jurisdiction to proceed.

Under-enforcement presents a clear threat to both local government and tribal interests. The significance of the problem is enhanced in light of increasing burdens on local governments to abide by state and federal land use requirements imposed by legislation such as state growth

management acts, the federal endangered species act, and the federal clean water act. The rule established by the Court of Appeals would create an unworkable environment that can be avoided if local governments have a clear measure of zoning and land use jurisdiction over all reservation fee lands regardless of their ownership. The rule threatens to disrupt zoning and land use regulation on reservations in the Ninth Circuit and, in the absence of a clear rule from this Court, every reservation throughout the United States. A decision from this Court is imperative to every tribe and local government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM GOBIN; GUY MADISON,	)	
	)	No. 00-36031
Plaintiffs-Appellees,	)	
	)	CT/AG#:
v.	)	CV-99-01432-RSL
	)	
SNOHOMISH COUNTY;	)	JUDGMENT
STEPHEN HOLT, Director,	)	
Snohomish County	)	FILED SEPT 18 2002
Department of Planning and	)	
Development Services,	)	
	)	
Defendants-Appellants,	)	
	)	
v.	)	
	)	
THE TULALIP TRIBES OF	)	
WASHINGTON,	)	
	)	
Plaintiff-intervenor-Appellee	)	
----------	)	
UNITED STATES OF AMERICA,	)	
amicus,	)	
	)	
Amicus.	)	
_____	)	

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered September 18, 2002.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM GOBIN; GUY MADISON,	)	
	)	No. 00-36031
Plaintiffs-Appellees,	)	
	)	D.C. No.
v.	)	CV-99-01432-RSL
	)	
SNOHOMISH COUNTY;	)	OPINION
STEPHEN HOLT, Director,	)	
Snohomish County	)	FILED SEPT 16 2002
Department of Planning and	)	
Development Services,	)	
	)	
Defendants-Appellants,	)	
	)	
v.	)	
	)	
THE TULALIP TRIBES OF	)	
WASHINGTON,	)	
	)	
Plaintiff-intervenor-Appellee	)	
	)	

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
June 6, 2002 – Seattle, Washington

Filed September 18, 2002

Before: Melvin Brunetti, Stephen S. Trott and Richard C. Tallman, Circuit Judges.

Opinion by Judge Trott

COUNSEL

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Steven J. Bladek, Snohomish County Prosecuting Attorney's Office, Everett, Washington, for the defendants-appellants.

OPINION

TROTT, Circuit Judge:

Snohomish County ("County") asserted land use jurisdiction over a proposed building project located on reservation land owned in fee simple by Kim Gobin and Guy Madison (collectively "Gobin"), registered members of the Tulalip Tribes of Washington ("the Tribes"). Gobin sought a declaratory judgment that the County lacked such jurisdiction over her lands. The district court agreed. We have jurisdiction over the County's timely appeal pursuant to 28 U.S.C. § 1291. We conclude that by making Gobin's fee lands freely alienable and encumberable, Congress did not expressly authorize County jurisdiction over those lands. Neither did exceptional circumstances warrant County jurisdiction in this case. Thus, we affirm.

BACKGROUND

The County rests between Puget Sound and the Cascade Mountain Range in northwest Washington. Over the past two decades the County's population has increased faster than any county in Washington.

The Tribes constitute a federally recognized Indian Tribe. The Tribes's reservation is located entirely within the County and comprises approximately 1.6% of the County's land area. About two thousand tribal members and eight thousand non-members inhabit the reservation's twenty-two thousand acres. The United States holds nearly half the reservation land in trust for the Tribes or individual members. The other half of the reservation is owned in fee simple by tribal members and nonmembers alike.

In 1972, pursuant to Article VI of the tribal Constitution, the Tribes established a comprehensive system of land use regulations and an administrative structure for implementing those regulations. In 1982, the Tribes created a seven-member Planning Commission charged with updating the land use regulations. Over the next decade, the Planning Commission developed a plan "balancing competing economic, development, housing, and natural resource priorities." Upon completion of the revised regulations, the Planning Commission prepared a zoning ordinance and map "to implement and preserve the integrity" of the plan. The zoning ordinance, Ordinance 80, was reviewed and approved by the Bureau of Indian Affairs and the Solicitor's Office in the Department of the Interior. . . .

The Tribes's zoning ordinance, Ordinance 80, establishes use and density restrictions throughout the reservation. It requires a building permit for all new construction and that structures be built in conformity with the Uniform Building Code. It also facilitates development by authorizing rezoning if a proposed project adheres to certain open space and density requirements. Other aspects of the Tribes's land use regulations ensure that building projects include utility easements, water and sewage systems that comply with the Tulalip Utilities Ordinance, a drainage plan based on the Washington Stormwater Management Manual, and protection for environmentally sensitive lands, including wetlands.

Pursuant to Ordinance 80, Gobin submitted to the Tribes an application to rezone and subdivide a twenty-five acre parcel of land located on Fire Trail Road. Gobin's proposed subdivision would connect to septic systems because sewer service is not available on that part of the reservation. Water

would flow from wells or private water systems because no established water lines connect to County water, and only Fire Trail Road, which is maintained by the County, would provide access to Gobin's proposed subdivision. Once built, Gobin planned to market these homes to the general public without regard for tribal affiliation.

Gobin paid the necessary regulatory fees and submitted an environmental checklist addressing environmental impacts, transportation, and public services. The Planning Commission evaluated Gobin's proposal and considered the necessary land use restrictions. The Planning Commission also sought public comments on Gobin's proposal and held public hearings to vet the matter. The Tribes notified the County of Gobin's proposal, but the County neither appeared at the public hearings nor offered any substantive comments. The County indicated only that "if the land is placed in trust, the County will recognize subdivision of individual trust land." "If the land is not acquired in trust, . . . its development will continue to be subject to Snohomish County jurisdiction and the applicable County zoning, subdivision, and development regulations." Under the applicable County regulations, Gobin could construct only ten homes instead of the proposed twenty-five. The County acknowledges that it would reject Gobin's proposed subdivision.

On June 8, 1999, the Tribes conditionally approved Gobin's twenty-five home development project. The conditions included grading restrictions, a buffer surrounding an on-site wetland, erosion and run-off controls, and approval of a public water system by the Tulalip Utilities Authority.

Despite the Tribes's approval, however, Gobin could not begin development without exposing herself to civil and criminal liability because of the County's asserted land use

jurisdiction. Moreover, Gobin's lender would not finance the project without resolution of the conflict. Gobin, therefore, sought a judicial declaration that the County "has no land use jurisdiction over lands owned by a member of the Tulalip Tribes and situated within the Reservation, and in particular [has] no jurisdiction to impose County zoning, subdivision and building code regulations on [her] development." The Tribes intervened, seeking a declaration that "the County lacks jurisdiction over the land use activities of[Gobin]."

Gobin and the Tribes moved for summary judgment. The County resisted, arguing that Congress expressly authorized its jurisdiction over reservation fee lands when it made those lands freely alienable and encumberable. In the alternative, the County argued that exceptional circumstances warranted its exercise of jurisdiction over reservation fee lands. The district court rejected the County's arguments. It found no express authorization from Congress and no circumstances so exceptional as to justify interfering with the Tribes's governance of its reservation. The County appealed. The United States appeared as amicus in support of the Tribes.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 (9th Cir. 2000). We must determine, viewing the evidence in the light most favorable to the County, whether there exist any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *Id.*

DISCUSSION

The parties agree on the dispositive questions: Whether

Congress expressly authorized the County to regulate reservation fee lands owned by tribal members, and whether exceptional circumstances warranted the County's exercise of jurisdiction over the tribal members' activities on those lands. Before turning to these pressing questions, we recount the relevant history.

I HISTORICAL FRAMEWORK

A. Allotment Generally

On February 8, 1887, Congress enacted the General Allotment Act ("GAA"), which was amended by the Burke Act in 1906. *See* 24 Stat. 388(GAA); 34 Stat. 182. As amended, the GAA authorized the President to allot tribal lands to individuals and families "in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use . . . by treaty stipulation." 24 Stat. 388. The GAA restricted immediate alienation or encumbrance of these lands by requiring that each parcel be held in trust by the United States for twenty-five years or longer. *Id.* at 389.

Section 5 of the GAA provided that "at the expiration of the trust period, the United States will convey[the land] by patent to [the] Indian . . . in fee, discharged of [the trust] and free of all charge or incumbrance. . . ." 25 U.S.C. § 348. Section 6, as amended by the Burke Act, stated that when the lands have been conveyed in fee to the Indians, "then each and every *allottee* shall have the benefit of and be subject to the laws, both criminal and civil, of the State or Territory in which they may reside. . . ." 25 U.S.C. § 349 (emphasis added). Even before the expiration of the trust period however, the Secretary of the Interior could issue a fee patent to an Indian allottee if he determined the allottee could

competently manage his affairs *Id.* Upon such a premature patenting, the so-called Burke Act proviso required that "all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . ." *Id.*

Land speculators took advantage of the ability of the Indians to alien freely their lands. The result: Nearly 90 million acres of land passed out of Indian hands during the allotment policy era. F. Cohen, *Handbook of Federal Indian Law* 614 (1982). To put an end to the allotment of Indian lands, Congress enacted the Indian Reorganization Act in 1934. By this legislation, Congress extended and augmented the existing restrictions on the sale or transfer of Indian lands. 25 U.S.C. §§ 462, 464. The Indian Reorganization Act, however, did not reverse any previous allotment of fee patented lands. It imposed neither restraints on the ability of Indian allottees to alienate or encumber their fee patented lands nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the GAA. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 255-56 (1992).

In 1948, Congress lifted the restrictions imposed by the Indian Reorganization Act and permitted the Secretary of the Interior, "upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians . . . ." 62 Stat. 236.

B. Allotment of Gobin's Land

On the Tribes's reservation, some land contains restrictions on use, sale, and taxation. Such restricted lands include those held in trust by the United States for the benefit

of the Tribes or individual tribal members as well as lands owned in fee by the Tribes. Currently about 50% of the reservation is classified as restricted land, but the Tribes expects that percentage to rise to 60% as it purchases more fee land. The County does not assert jurisdiction over any restricted lands.

The remaining reservation land is owned by tribal members and nonmembers in conventional fee simple. This land was allotted pursuant to the Treaty of Point Elliot. 12 Stat. 927 (Jan. 22, 1855). Article VII of that Treaty incorporated Article 6 of the Omaha Treaty, which held that the President was authorized to patent land to individuals or families "conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture . . . ." 12 Stat. 927. (incorporating Omaha Treaty, Article 6, 10 Stat. 1043 (Mar. 16, 1854)). These restrictions could be removed by State legislation but only with the consent of Congress. In fact, the restrictions on the land were removed when Washington became a State in 1889. At that time, Indian fee owners obtained the "power to lease, incumber, grant, and alien" fee land in the same manner as other citizens. *Goudy v. Meath*, 203 U.S. 146, 147 (1906).

Gobin's land, in particular, was originally patented to Charley Shelton on April 1, 1885. Shelton's land patent states the land is granted pursuant to the Treaty of Point Elliot and the Omaha Treaty and incorporates the restrictions on alienation found in those Treaties. The parties agree that Shelton's land remained subject to these restrictions on alienation until 1962 when the Secretary of the Interior approved a deed from Charley Shelton's heirs to non-Indians pursuant to the Act of May 14, 1948. Gobin subsequently purchased the land in fee simple in 1998.

II EXPRESS CONGRESSIONAL AUTHORIZATION

The policy of leaving Indians free from State jurisdiction is deeply rooted in our Nation's history. *Rice v. Olson*, 324 U.S. 786, 789 (1945). In determining the extent of State jurisdiction over Indians, State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973). If faced with two reasonable constructions of Congress's intent, this Court resolves the matter in favor of the Indians. *Id.* at 174.

A. Alienability[1]

Here, the County argues broadly that Congress expressly authorized plenary state in rem jurisdiction when it made Indian fee lands freely alienable. At the outset, we note that the County's argument does not turn on whether Gobin's land was patented pursuant to the GAA or the Treaty of Point Elliot. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (holding Congress intended to make land allotted pursuant to the Nelson Act subject to tax when making it freely alienable). Indeed, it is undisputed that Gobin's land is freely alienable. If alienability allows plenary State in rem jurisdiction then the

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[1] Although section 6 of the GAA provides that "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside," this section does not provide carte blanche for States to exercise jurisdiction over Indians. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976), the Supreme Court refused to extend Section 6 beyond its literal coverage ("*each and every allottee*") to include subsequent Indian owners of the allotted parcels.

County may apply its land use regulations to Gobin's property.

The County seeks to analogize the facts of this case to those in *County of Yakima,* where the Supreme Court thought that it would be "strange" to "permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [sic] from taxation." 502 U.S. at 263 (quoting *Goudy,* 203 U.S. at 149). The Court believed that Congress would have "clearly manifested" the "strange" intent to allow unrestricted alienation while at the same time withholding the land from taxation or forced alienation. *Id.* (quoting *Goudy,* 203 U.S. at 149). Finding no such clear congressional intent, the Court held that Section 5 unmistakably implied that when land became alienable and encumberable, it also became subject to ad valorem property taxes. *Id.* at 263-64; *see also Cass County,* 524 U.S. at 115 ("When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation."); *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993) ("[L]and is taxable if it is alienable.").[2]

The Court further held that Section 5's unmistakable implication was made explicit by the Burke Act proviso to Section 6. *County of Yakima,* 502 U.S. at 264. Section 6, as amended, allowed the Secretary of the Interior to issue fee patents to certain allottees before the expiration of the trust period. "Although such a fee patent would not subject its Indian owner to *plenary* state jurisdiction, fee ownership

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[2] In *Lummi Indian Tribe,* we additionally remarked that *County of Yakima*'s determination that an implication drawn from Section 5 of the GAA allows State ad valorem taxation of Indian fee lands "may be hard to square with the requirement" "that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi Indian Tribe*, 5 F.3d at 1358.

would free the *land* of 'all restrictions as to sale, incumbrance, or taxation.' " *Id.* (emphasis in original, quoting 25 U.S.C. § 349). The Court held that Section 6 reaffirmed, for prematurely patented land, what Section 5 unmistakably implied with respect to patented land generally: Freely alienable fee lands are subject to State ad valorem property taxes. *Id.*

The Court, however, refused to extend the GAA's "taxation of . . . land" to encompass an excise tax the State of Washington wished to levy on the proceeds of the sale of fee patented lands. The Court found that although "taxation of land" could have been reasonably interpreted to include the excise tax, that was not its unambiguous meaning. Thus, faced with multiple reasonable constructions of "taxation of . . . land," the Court interpreted the phrase in favor of the Indians and consequently, refused to impose the excise tax. *Id.* at 258, 269.

The Supreme Court has reaffirmed the holding of *County of Yakima* in *Cass County,* 524 U.S. at 114-15. To date, however, neither the Supreme Court nor this Court has extended *County of Yakima* to find that Congress expressly authorized any other State regulation of the Indians when it made Indian fee lands freely alienable. Indeed, the Court in *County of Yakima* took pains to explain the narrowness of its holding. It held that alienability led inevitably to taxation of land, but not to "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." *County of Yakima,* 502 U.S. at 269. The Court further limited its holding by requiring that Congress "expressly authorize" other State regulation of Indians on reservation lands and that ambiguities of congressional intent be construed in favor of the Indians. *Id.* at 258, 269.

[1] In this case, the County seeks an unprecedented

extension of *County of Yakima.* It contends that Congress expressly authorized plenary State in rem land use regulation when it made Indian fee lands freely alienable. We disagree. Congress's decision to make Indian fee lands freely alienable is not an express authorization or otherwise an "unmistakably clear" indication that the County may enforce its in rem land use regulations over those lands. Unlike the inextricably linked concepts of (forced) alienation and taxation found in *County of Yakima,* alienation and plenary in rem land use regulation are entirely unrelated. Thus, we hold that the right of Indians to alienate their lands freely does not provide the County with a concomitant right to exert in rem land use regulation over those lands.

B. Encumberability

[2] The County argues that Congress expressly authorized State land use regulation over Indian fee lands when it made those lands freely encumberable. In the Burke Act proviso, which applies to "all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use," Congress provided that "all restrictions as to . . . incumbrance[s] . . . of said land" shall be removed upon the patenting of the land in fee. 25 U.S.C. § 349. While the Burke Act does not strictly apply to Gobin's land, it does evince Congress's intent to make alienable lands freely encumberable.

Moreover, as required by The Treaty of Point Elliot (incorporating The Treaty of the Omahas), Congress expressly approved the State of Washington's grant of Indian lands in fee, which empowered Indian recipients to "lease, incumber, grant, and alien" their lands in the same manner and with the same effect as other citizens. *Goudy,* 203 U.S. at 147. The parties agree that Gobin's land is freely encumberable.

Unsurprisingly, the County would define "encumbrance" broadly (and thereby encompass all of its land use regulations) to include any right "in the land to restrict its use in a way that diminishes its value." For support the County cites *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 667-68 (9th Cir. 1975), in which we interpreted the ambiguous term "encumbrance," found in Public Law 280, 67 Stat. 589 (1953), to include Kings County's zoning regulations. We interpreted "encumbrance" in that way so as to find ultimately that the County's zoning regulations did *not* apply to the Indians' land. *Id.; see also Snohomish County v. Seattle Disposal Co.,* 70 Wash. 2d 668, 672 (1967) (holding that the County's zoning laws constituted an encumbrance which did not apply to Indian lands).

The United States suggests a narrower definition of encumbrance: A "property interest running with the title-something like a lien, a lease, or an easement." Black's Law Dictionary treads an intermediate course: "Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with passing of the fee." Black's Law Dictionary 527 (6th ed.1990).

[3] Despite the inherent ambiguity in the word "encumbrance" standing alone, here, the operative phrase is "encumbrance *of land.*" The prepositional phrase "of land" necessarily limits the scope of permissible encumbrances. Encumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land, therefore, are not permitted. *Id.* at 269.

[4] In this case, the County's land use regulations, which prohibit Gobin from building her subdivision, encumber the transactions and activities involving land. The objectionable County density requirement, in particular, does not burden

the land itself, but rather burdens the use to which Gobin seeks to put the land. Indeed, apart from Gobin's proposed activities, the County's land use regulations have no force. These regulations resemble the excise tax in *County of Yakima:* Although tangentially related to land, they are not inextricably linked to the land itself. Thus, we hold that Congress did not expressly authorize plenary State land use regulation over Indian fee lands when it made those lands freely encumberable.

III EXCEPTIONAL CIRCUMSTANCES

In "exceptional circumstances," a State may assert jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional intent to do so. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214-15 (1987) (quoting *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-32 (1983)). The asserted exceptional circumstances are weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency, and economic development. *Id.* at 216.

In *Moe,* for example, the State of Montana could require tribal smokeshops to collect sales tax from their non-Indian clientele. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. at 483. Montana's interest in collecting cigarette taxes from non-Indians outweighed the "minimal burden" imposed on tribal cigarette vendors. *Id.* In *Cabazon Band,* on the other hand, the Supreme Court rejected California's contention that its interest in thwarting organized crime sufficiently warranted imposition of its gambling laws on tribal high-stakes bingo. 480 U.S. at 220-21. Despite the importance of the State of California's interest in organized crime prevention, it did not outweigh tribal interests in self-determination and self-sufficiency. *Id.*

The County suggests an array of interests, including protecting endangered species, regulating County-maintained roads and storm sewers, providing a continuum of land use enforcement for all fee lands, and complying with applicable health and safety codes, to counterbalance the Tribes's strong interests in self-determination. Not only must the County explain why these interests are exceptional, but it must explain why these interests are exceptional for reservation *fee* lands, given the County's inability to regulate reservation lands held in trust. The Tribes contends, in opposition to the County's claims, that its strong interests in self-determination and self- government outweigh the County's interests.

Undoubtedly, the County maintains an important interest in protecting the bull trout and the salmon in Quilceda Creek, as required by the Endangered Species Act. This interest is not exceptional, however, given that the Tribes must also comply with the Endangered Species Act as well as its own strict laws protecting wildlife.

Regulating roads and storm sewers are also important County interests. As the district court held, however, they are not exceptional enough to warrant interference with tribal self-government and self-determination. Presumably, the County already manages its roads and storm sewers despite not exercising authority over eleven thousand acres of reservation land held in trust.

Assuring the health and safety of County citizens is also an important interest, but an unexceptional one given the County's lack of jurisdiction on other parts of the reservation. Although the County may assert its health and safety regulations if a non-Indian purchases one of Gobin's homes, such a speculative ability to regulate is insufficient to overcome the Tribes's overwhelming interests.

That Indians and non-Indians might conspire to transfer fee lands back and forth to avoid any County or tribal regulation presents a problem of enforcement best handled jointly by the County and the Tribes in furtherance of their already excellent relationship. Yet such an administrative problem presents no reason for this Court to undermine Indian sovereignty in favor of County regulation.

Even adding these important County interests together, they do not outweigh the Tribes's interest in self-determination. Regardless of the similarities between County and tribal land use regulations or the congenial nature of the parties' relationship, concurrent County and Tribes plenary land use jurisdiction threatens to supplant the Tribes's Ordinances (and thus its attempt at self-government) when the two regulatory regimes diverge. Such County interference with tribal self-determination is not consistent with *Cabazon Band* nor does it constitute a "minimal burden" like the one condoned in *Moe*, 425 U.S. at 483. Indeed, nothing could be more contrary to the well-established policy of leaving Indians free from state jurisdiction and control. *See McClanahan*, 411 U.S. at 168.

CONCLUSION

For the reasons delineated above, we affirm the district court's decision.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

KIM GOBIN and GUY MADISON,	)	
	)	Case No. C99-1432L
Plaintiffs, and	)	
	)	JUDGMENT IN A CIVIL
THE TULALIP TRIBES OF WASHINGTON,	)	CASE
	)	
Plaintiff-Intervenor,	)	FILED: OCT 27 2000
v.	)	
SNOHOMISH COUNTY and STEPHEN HOLT,	)	
Defendants.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs' and plaintiff-intervenor's motions for summary judgment are hereby GRANTED. The Court DECLARES that SNOHOMISH county lacks jurisdiction to apply its land use regulations to lands owned in fee by members of the Tulalip

Tribes on the Tulalip reservation, and that The Tulalip Tribes has exclusive jurisdiction to regulate land use on such lands.

October 27, 2000

BRUCE RIFKIN
Clerk

s/ Gail Glass
By Gail Glass, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM GOBIN and GUY MADISON, Plaintiffs, and THE TULALIP TRIBES OF WASHINGTON, Plaintiff-Intervenor, v. SNOHOMISH COUNTY and STEPHEN HOLT, director, Snohomish County Department of Planning and Development Services, Defendants.	Case No. C99-1432L ORDER GRANTING SUMMARY JUDGMENT FILED: OCT 20 2000

This matter comes before the Court on plaintiffs' and plaintiff-intervenor's motions for summary judgment. For the reasons set forth below, the Court will grant those motions.

I. BACKGROUND

Plaintiffs Kim Gobin and Guy Madison are enrolled members of The Tulalip Tribes of Washington ("the Tribes")[1] who own certain parcels of land located within the boundaries of the Tulalip reservation ("the reservation"). Plaintiffs own these parcels of land in fee simple. Plaintiffs wish to develop their land in a manner that conflicts with certain Snohomish County ("the County") land use and zoning regulations. Plaintiffs have sought a declaratory judgment that the County's land use regulations do not apply to reservation lands owned in fee simple by members of the Tribes.[2]

During the late 19th Century, the United States altered the manner in which Indian reservation lands were segregated for the use and control of Indians by allotting the lands to tribe members individually, rather than to Indian tribes. Because the allotted land could be sold soon after it was received, many of the individual tribe members quickly lost their lands through transactions that were "unwise or even procured by fraud." County of Yakima v. Yakima Indian Nation, 502 U.S. 253, 254 (1992), citing F. Cohen, Handbook of Federal Indian Law 129-30 (1982 ed.). By 1934, nearly 90 million acres of land had passed out of Indian hands. Id., 614. The Indian Reorganization Act

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[1] "The Tribes" is used in the singular tense because it is used here to refer to a single entity.

[2] This dispute is ripe for the Court's resolution because plaintiffs are unable to secure funding for the development they seek to undertake while this dispute remains unsettled. Specifically, First Heritage Bank has declined to release financing for plaintiffs' projects without a court ruling on this issue. See also, Construction Industry Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (holding that a zoning ordinance adversely affecting the value and marketability of property constituted a sufficient threat of direct and personal injury to landowners to enable them to seek a declaratory judgment).

ended the allotment programs in 1934, and authorized the federal government to acquire and hold title to lands in trust for the benefit of Indian tribes and their members. Id.; see also, Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 (9th Cir. 1975), citing 25 U.S.C. § 476. As a result, lands located within the boundaries of Indian reservations today may be owned by tribes, tribe members, or non-members, and the land may be owned in trust by the United States, by tribes and tribe members subject to federal restrictions on alienation, or simply in fee.

It is well-settled that lands held in trust may not be regulated by state and local governments "except as Congress chose to grant that power." Id., citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 176 (1973). In this case, however, the County argues that plaintiffs' land is subject to County regulations because it is owned in fee. Jurisdiction over reservation lands, the County argues, "is based upon the status of the land, not the status of the owner of the land." Answer and Counterclaim, ¶ 11. Plaintiffs and the Tribes argue that the Tribes has exclusive jurisdiction over the development activities of members on the reservation, and that such authority is premised on the right of members to govern themselves on the reservation.

II. DISCUSSION

The parties agree that the law permits a state or local government to exercise jurisdiction over the on-reservation activities of tribe members only when doing so is expressly authorized by Congress, or when "exceptional circumstances" justify the exercise of such jurisdiction. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-16 (1987). However the parties disagree over whether Congress has authorized County authority and whether exceptional circumstances exist in this case.

A. Express Authority Under Federal Law

Defendants argue that Congress' express removal of restrictions on alienability – which has been held to also remove restrictions on taxation – constitutes express authorization of land use regulation by local government. Defendants cite County of Yakima v. Yakima Indian Nation, in which the Supreme Court held that the Indian General Allotment Act (or Dawes Act), which made allotted lands alienable, also permitted a county to impose an ad valorem tax on reservation lands patented in fee pursuant to the Act. 502 U.S. at 259. The Ninth Circuit likewise has held that lands approved for alienation by the federal government pursuant to treaty, and later reacquired by Indian tribes are taxable because they are alienable, relying on the reasoning of County of Yakima. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993).[3]

Defendants argue that the removal of restrictions as to sale, encumbrance, or taxation on fee-patented lands pursuant to the Dawes Act equally extends to land use regulations. Under Washington law, the County argues, zoning and land use regulations are encumbrances on the land because they restrict the land's use as opposed to limiting the land owner's activity. Opp. at 13, citing Snohomish County v. Seattle Disposal Co., 70 Wn.2d 668, 672 (1967), cert. denied, 389 U.S. 1016 (1967). Plaintiffs and the Tribes, however, point out that the Supreme Court in County of Yakima distinguished between real property taxes on fee-patented land owned by a tribe member and excise taxes imposed on the sale of fee-patented land by a tribe member. The Court specifically held that the excise tax was impermissible

[3] In Lummi Indian Tribe the Ninth Circuit construed the Treaty of Point Elliott, which also covered the land at issue in this case.

because it was "a tax upon the Indian's activity of selling the land," rather than simply a tax on the land itself. County of Yakima, 502 U.S. at 269. The Court noted that while the "object of the *sale*" was land, "that does not make the land the object of the *tax*." Id. at 268. Accordingly, the Court declined to interpret the statute's use of the term "taxation of . . . land" as extending to taxation of the *activity* of selling the land.

Here, where the Court must find express Congressional authorization of county land use jurisdiction, County of Yakima provides little guidance. If a county's authority to tax fee lands owned by tribe members does not give it authority to tax the tribe members' activity of selling the land, then certainly taxation authority cannot be extended to authority to regulate tribe members' activity of using the land. Indeed, the Supreme Court has explained that the Dawes Act "did not itself transfer any regulatory power from the Tribe to any state or local governmental authority, . . . [but rather] by providing for the allotment and ultimate alienation of reservation land, the Act in some respects diminished tribal authority." Brendale v. Confederated Tribes & Bands of The Yakima Indian Nation, 492 U.S. 408, 436-37 (1989) (plurality opinion).

Moreover, the County's argument that zoning and land use regulations are encumbrances on the land, rather than prohibitions on tribe members' activity, does not resolve the issue. In Snohomish County v. Seattle Disposal Co., the Washington Supreme Court held that a zoning ordinance may be viewed as an encumbrance because it "could be considered to diminish [the land's] value." 70 Wn.2d at 672. However, the court also held in that case that the County's "[l]imitation on the use to which a lessee from the Tulalip Tribes can put Indian lands is limiting the Indian use," which it acknowledged was impermissible. Id. at 673.

Accordingly, although a zoning ordinance or land use regulation may be considered an encumbrance on the land, it also may have the effect of limiting the tribe members' *activity* of developing that land. Under County of Yakima's reasoning with respect to taxation of land sale activity, the Court finds that an encumbrance that restricts a tribe member's activity on the land, must be analyzed in light of its effect on that *activity*. Therefore, the Court disagrees with defendants' argument that the County's jurisdiction is solely a function of the status of the land, rather than the status of the owner.

Having considered defendants' arguments, the Court is not persuaded that Congress *expressly* authorized County jurisdiction over plaintiffs' use of their land by making the land alienable under the Dawes Act. Restrictions on land use are not unambiguously tied to the land's alienability. Moreover, as the Supreme Court stated in Brendale, "Congress could not possibly have intended [through the allotment process] . . . that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land." 492 U.S. at 441-42. Therefore, particularly in light of the doctrine that statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," the Court finds that land use jurisdiction over plaintiffs' land was not expressly granted to the County by Congress. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

B. Exceptional Circumstances

The County's regulation of the plaintiffs' land use may also be permissible under "exceptional circumstances" even if such exercise might interfere with or be incompatible with tribal or federal interests in tribal self-government. California v. Cabazon Band of Mission Indians, 480 U.S. at

216. The County has identified several interests justifying exercise of such jurisdiction, including the County's interest in regulating development in order to protect endangered or threatened species, including salmon and bull trout in certain creeks, the County's interest in regulating impacts on County-maintained roads and the accompanying components of the county's storm sewer system, the County's interest in providing a continuum of land use enforcement and services for all fee lands, regardless of ownership, and the County's interest in ensuring compliance with health and safety codes.

The County has acknowledged that it lacks jurisdiction to regulate land use on reservation lands owned in trust. Accordingly, the County already faces challenges in vindicating the above-referenced interests while being subject to the jurisdictional limitations inherent on Indian reservation lands. The County must demonstrate, therefore, that development of the fee lands at issue here will incrementally impact those interests.

The County's interests in protecting endangered or threatened species and maintaining its roads and storm sewer system are indeed important. However, the County has not shown that exercising jurisdiction over fee lands owned by tribe members on the reservation constitutes an "exceptional circumstance" under Cabazon Band of Mission Indians. Presumably the County has identified methods of managing these important interests in the context of a reservation where much of the land is outside County jurisdiction because it is owned in trust. The court finds no compelling evidence that the Indian-owned fee lands will make the critical difference here.

As to the County's interest in providing "a continuum" of land use enforcement and management on the reservation fee lands, the Court finds that this is not an

exceptional circumstance justifying land use jurisdiction over the tribe members' land. By its very nature, reservation lands are distinct from non-reservation lands located in the County. Consistency in land use regulation, while undoubtedly convenient and efficient for the County, is not justified to the extent it would eliminate important distinctions between Indian-owned and non-Indian-owned reservation lands.

Finally, the County's interest in maintaining health and safety codes is important, but not so exceptional as to justify subjecting tribe members residing on a reservation to County restrictions on their activity. The County rightly points out that the developed land may be sold by plaintiffs to non-members. However, this speculative possibility is not a sufficient basis to justify extending County jurisdiction to fee lands owned by tribe members. It is equally possible that plaintiffs could develop their property into housing exclusively for tribe members. Either way, the County is without jurisdiction to regulate the tribe members' activity of developing their reservation land as they wish.

Therefore, the Court finds that none of these interests is dependent upon the County's exercise of land use jurisdiction over the land at issue here. The County is already unable to exercise jurisdiction over reservation lands that are owned in trust, which presumably have the same potential effects on the County's ability to safeguard those interests. Thus, the County already must deal with a "checkerboard" of trust lands and non-member-owned lands on the reservation, which the Supreme Court has recognized as an inevitability. Brendale, 492 U.S. at 422-25.

By contrast, courts repeatedly have recognized the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." Cabazon Band of Mission Indians,

480 U.S. at 216-17. This goal is of paramount importance, notwithstanding the county's legitimate regulatory responsibilities. Even where a state expends money in providing services to a reservation, the Supreme Court has held that such privileges "cannot affect [the Indians'] situation, which can only be changed by treaty stipulation or a voluntary abandonment of their tribal organization." McClanahan, 411 U.S. at 173, n.12. Indeed, the Supreme Court has consistently respected Congress' strong commitment to Indian self-determination in such situations. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 476 (1976); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335-36 (1983). In light of this body of law, therefore, the Court cannot say the circumstances of this case are so "exceptional" as to justify departing from the well-established "policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in the Nation's history." McClanahan, 411 U.S. at 168, citing Rice v. Olson, 324 U.S. 786, 789 (1945).

III. CONCLUSION AND ORDER

The Court finds that Congress has not authorized Snohomish County to regulate the use of fee lands owned by members of The Tulalip Tribes on the Tulalip reservation, nor do exceptional circumstances exist justifying the exercise of such jurisdiction. Therefore, the Court will grant summary judgment in favor of plaintiffs and plaintiff-intervenor.

ACCORDINGLY, it is hereby ORDERED that plaintiffs' and plaintiff-intervenor's motions for summary judgment are hereby GRANTED. The Court DECLARES that Snohomish County lacks jurisdiction to apply its land use regulations to lands owned in fee by members of The Tulalip Tribes on the Tulalip reservation, and that The

Tulalip Tribes has exclusive jurisdiction to regulate land use on such lands.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 20th day of October, 2000.

s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX E

TREATY OF POINT ELLIOTT

1855

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluch-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-quilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, an interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly following the summit of said range to the 49th

parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canel de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands theretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserve, the Indians being compensated for any damage thereby done

them.

Article 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land on the northeastern shore of Port Gardner, and north of the mouth of Sno-homish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be unlawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the

sum of one hundred and fifty thousand dollars, in the following manner – that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper office, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either ror all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on renumerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly

therefore.

ARTICLE 8. The annuties of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowlege their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the same tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire

others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the

President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent.

APPENDIX F

25 U.S.C. § 348.

Patents to be held in trust; descent and partition.

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as provided by the Indian Land Consolidation Act [25 U.S.C.A. § 2201 et seq.] or a tribal probate code approved under such Act and except as herein otherwise provided: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian

tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the

Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

(Feb. 8, 1887, c. 119, § 5, 24 Stat. 389; Mar. 3, 1901, c. 832, § 9, 31 Stat. 1085; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100; Nov. 7, 2000, Pub. L. 106-462, Title I, § 106(a)(2), 114 Stat. 2007.)

APPENDIX G

25 U.S.C. § 349.

Patents in fee to allotees.

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

(Feb. 8, 1887, c. 119, § 6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRESENT: THE HONORABLE BARBARA JACOBS ROTHSTEIN

DATE: JANUARY 23, 2001

RALPH MERKEL, JAMES BROCK and MARVIN NAPOLEON,	)	
Plaintiffs,	)	NO. C00-713R
v.	)	
	)	MINUTE ENTRY
SNOHOMISH COUNTY, and STEPHEN HOLT, Director, Snohomish County Planning and Development Services,	)	FILED: JAN 23 2001
Defendants.	)	

IN CHAMBERS PROCEEDINGS:

The court has reviewed defendants' motion to dismiss this action without prejudice. Having been informed that plaintiffs do not oppose dismissal, defendants' motion is,

hereby, GRANTED. This action is dismissed in its entirety, without prejudice to plaintiffs' right to refile the action at a later date.

MINUTE ENTRY - January 23, 2001

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

RALPH MERKEL, JAMES BROCK and MARVIN NAPOLEON,	)	
Plaintiffs,	)	NO. C00-713R
vs.	)	
SNOHOMISH COUNTY, and STEPHEN HOLT, Director, Snohomish County Planning and Development Services,	)	AFFIDAVIT OF THOMAS M. FITZPATRICK IN SUPPORT OF DEFENDANT SNOHOMISH COUNTY'S MOTION TO DISMISS WITHOUT PREJUDICE
Defendants.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

Thomas M. Fitzpatrick, being first duly sworn, upon oath deposes and states as follows:

1. I am a Deputy Prosecuting Attorney for Snohomish County and counsel of record for Defendant

Snohomish County in this matter.

2. Since this case was removed to federal court, I have received a Notice of Withdrawal by Plaintiff's counsel, Satwant Singh Pandher. I have never received a motion or order allowing the withdrawal of counsel as required by GR 2(f)(4). Accordingly, said motion is being served upon Mr. Pandher.

3. The basic issue involved in this case, which is an appeal under the Land Use Petition Act of the State of Washington, is the question as to whether or not Snohomish County has land use jurisdiction over Native Americans on fee land located within the exterior boundaries of the Tulalip Indian Reservation.

4. At the time this case was removed to this court, the jurisdictional issue was being litigated by the Tulalip Tribes and Snohomish County in a case known as Gobin/Madison/Tulalip Tribes v. Snohomish County, Cause No. C99-1432L, which was before Judge Lasnik. After extensive briefing and argument, Judge Lasnik ruled on summary judgment that the Tulalip Tribes have exclusive jurisdiction over the land use activities of members of the Tribe on fee land within the exterior borders of the Tulalip Indian Reservation. A copy of Judge Lasnik's opinion is attached as Exhibit 1 to this Affidavit.

5. I have confirmed that the property at issue is presently held in fee simple by Marvin Napoleon. The Tulalip Tribes have confirmed that Mr. Napoleon is a registered member of the Tulalip Tribes. Attached and made a part hereto is a true and correct copy of a letter of December 13, 2000, from Wendy Young, Enrollment Officer of the Tulalip Tribes, attached as Exhibit 2.

6. Presently the Gobin/Madison case has been appealed by Snohomish County to the 9th Circuit Court of Appeals, Cause No. 00-36031. A stay of Judge Lasnik's ruling was not sought or entered. Accordingly, it is the position of Snohomish County that Judge Lasnik's decision is final and binding until such time as it is reversed by higher appellate authority. Accordingly, Snohomish County believes Judge Lasnik's decision is dispositive of the only issue, County jurisdiction, which is involved in this case. It is for that reason that Snohomish County therefore seeks dismissal of this action. The County requests that the dismissal be without prejudice, because if Judge Lasnik is reversed by a higher appellate authority, the County seeks the option of re-instituting code enforcement activity on this particular property. Until that time, the County will refer this matter to the Tulalip Tribes.

s/ Thomas M. Fitzpatrick
Thomas M. Fitzpatrick

SUBSCRIBED AND SWORN to before me this 18 day of December, 2000.

s/ Lori A. Bowen
NOTARY PUBLIC in and for the State of Washington, residing at Monroe. My commission expires: 4/8/04

FILED

FEB 6 2003

OFFICE OF THE CLERK

No. 02-1029

IN THE

Supreme Court of the United States

SNOHOMISH COUNTY and STEPHEN HOLT,
Director, Snohomish County Department of
Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON;
THE TULALIP TRIBES OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS KIM GOBIN AND GUY MADISON

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This case involves the efforts of Petitioner Snohomish County to regulate Indian development of Indian-owned fee lands within the Tulalip Indian Reservation in the State of Washington. The Ninth Circuit, in a unanimous opinion by Judge Stephen S. Trott, rejected Petitioner's argument that Congress expressly authorized such regulation as an "unprecedented extension" of existing law. Pet. App. 14a-15a. As Petitioner essentially acknowledges, the court of appeals' decision does not conflict with the decision of any other federal circuit court, any federal district court or any state court. Nor does it conflict with any decision of this Court or present a recurring legal issue: with the exception of this case, state authority to regulate Indian land use on Indian-owned fee lands in Indian country has been considered in only two trial court decisions (both of which held such regulations could not be sustained). Thus, this case involves only the unexceptional and correct application of well settled principles of law in a factual setting that rarely gives rise to litigation. This Court's review is unwarranted.

STATEMENT OF THE CASE

Respondent Kim Gobin, an enrolled member of a federally recognized Indian tribe (Respondent Tulalip Tribes), owns a 20-acre parcel of land within the Tulalip Reservation in fee simple. Pet. App. 5a; CA Excerpts 71 at 112.[1] Gobin

1. Lands on the Tulalip Reservation were allotted to tribal members, subject to restrictions on alienation, under the Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855). *See* Pet. App. 11a. The restrictions on alienation of the land at issue in this case were extended in 1934 by the Indian Reorganization Act, *see* 25 U.S.C. §§ 462, 464, but were removed in 1962 pursuant to the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483. The 1948 Act authorized (Cont'd)

and her brother (Respondent Guy Madison), also an enrolled member of the tribe, seek to develop a routine, 25-home residential subdivision on her land. Pet. App. at 6a-7a.

The tribe has a comprehensive tribal land use ordinance, which was designed to balance the need for housing and the preservation of natural resources on the reservation, in order to fulfill the purposes of the reservation as the tribe's homeland. *Id.* at 6a; CA Excerpts 84 at 64-66. The ordinance was approved by the Secretary of the Interior. Pet. App. 6a.

Gobin submitted an application to the tribe to subdivide and rezone the lands pursuant to the tribe's land use ordinance. *Id.* at 6a-7a. The tribe's professional staff reviewed the application, solicited comments from the county, and recommended that the application be approved with conditions. *Id.* at 7a; CA Excerpts 71 at 5-6, 111-18. The tribe's planning commission held a public hearing on the application, and also recommended that it be approved with conditions. Pet. App. 7a; CA Excerpts 71 at 5-7, 112, 130. The tribe's governing body formally approved the application at an open meeting based on the recommendations of the tribe's professional staff and planning commission. Pet. App. 7a.

In response to the tribe's request for comments, the county made *no* substantive objection to any aspect of the proposed development and did not seek to impose *any*

(Cont'd)
the Secretary of the Interior, "upon application of the Indian owners, to issue patents in fee, to remove restrictions on alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the [Indian Reorganization Act]."

conditions on it. *Id.* Neither the county nor anyone else opposed the development at the public hearing held by the tribe's planning commission or at any other stage of the tribe's land use process. *Id.*

County regulation would subject Gobin to a second regulatory process and, in conflict with the tribe's land use ordinance, the recommendations of the tribe's professional staff and planning commission, and the decision of the tribe's governing body, would prohibit the proposed residential development because it exceeds allowable housing densities under the county's zoning ordinance. *Id.* Gobin and Madison filed suit against the county seeking a declaratory judgment that the county lacked jurisdiction to regulate their planned development, and the tribe intervened as a plaintiff. *Id.* at 23a. The district court (Lasnik, J.), adhering to the deeply rooted policy of leaving Indians free from state jurisdiction and control, held that the county could not regulate the residential development at issue in this case. Pet. App. 30a, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

In the court of appeals,[2] Petitioner relied extensively on *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). In *Yakima*, the Court held that a State is without power to tax reservation lands and reservation Indians unless congressional intent to allow such state action is "unmistakably clear." The Court then held that, in authorizing the removal of restrictions on alienation of Indian lands in sections 5 and 6 of the General Allotment

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2. The United States submitted a brief and argued in the court of appeals as *amicus curiae* in support of Gobin, Madison and the tribe.

Act, 25 U.S.C. §§ 348 & 349, Congress had clearly authorized the imposition of *ad valorem* property taxes on such lands. 502 U.S. at 263-66. However, the Court also held that the removal of restrictions on alienation did *not* authorize imposition of excise taxes on the sale of Indian lands. *Id.* at 268-70. In so holding, the Court emphasized that an excise tax was not a "taxation of land" as that term was used in the General Allotment Act, because an excise tax is a tax on the activity of selling land rather than a tax on the land itself. *Id.* at 269.

The court of appeals (Brunetti, *Trott* and Tallman, JJ.) faithfully applied *Yakima*. It recognized, for example, that both this Court and prior panels of the Ninth Circuit had reaffirmed the holding that, in making reservation lands alienable, Congress made unmistakably clear its intent to subject the lands to state and local taxation. Pet. App. 13a-14a, discussing *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-15 (1998), and *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993). However, the court of appeals also recognized correctly that neither this Court nor the Ninth Circuit "has extended *County of Yakima* to find that Congress expressly authorized any other State regulation of the Indians when it made Indian fee lands freely alienable." Pet. App. 14a.

The court of appeals rejected the "unprecedented extension" of *Yakima* sought by Petitioner on two grounds. *Id.* at 14a-15a. First, it held that "Congress's decision to make Indian fee lands freely alienable is not an express authorization or otherwise an 'unmistakably clear' indication that the County may enforce its in rem land use regulations over those lands," since "[u]nlike the inextricably linked concepts of (forced) alienation and taxation found in *County*

of Yakima, alienation and plenary in rem land use regulation are entirely unrelated." *Id.* at 15a. Second, just as the section 6 proviso authorized only "taxation of lands," it permits only "encumbrances of lands," not "[e]ncumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land." *Id.* at 16a. As Judge Trott explained:

> In this case, the County's land use regulations, which prohibit Gobin from building her subdivision, encumber the transactions and activities involving land. The objectionable County density requirement, in particular, does not burden the land itself, but rather burdens the use to which Gobin seeks to put the land. Indeed, apart from Gobin's proposed activities, the County's land use regulations have no force. These regulations resemble the excise tax in *County of Yakima*: Although tangentially related to land, they are not inextricably linked to the land itself.

Id. at 16a-17a.

The court of appeals also rejected Petitioner's argument that, under *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987), this case presented "exceptional circumstances" justifying county jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional authority for such jurisdiction. Pet. App. 17a-19a. The court found that the assertion of county jurisdiction threatened to supplant the tribe's ordinances "and thus its attempt at self-government." *Id.* at 19a. This was not a "minimal burden" like the one condoned in *Moe v. Confederated Salish & Kootenai Tribes*,

425 U.S. 463, 483 (1976), but was directly contrary to the well-established policy of leaving Indians free from state jurisdiction and control. Pet. App. 19a. Even considering the county's interests collectively, the court found they did not "outweigh the [tribe's] interest in self-determination." *Id.*

Petitioner did not seek rehearing or *en banc* consideration in the court of appeals, but now seeks a writ of *certiorari* from this Court.

REASONS FOR DENYING THE PETITION

No other federal or state appellate court has addressed state or local regulation of on-reservation Indian development on Indian-owned fee lands. Petitioner does not allege that the Ninth Circuit's decision conflicts with the decision of *any* federal circuit court, *any* state court, or *any* federal district court.[3] Moreover, Petitioner does not challenge the legal tests employed by the Ninth Circuit to determine whether a county may regulate Indian activities on an Indian reservation. Petitioner challenges only the *application* of those tests to the particular circumstances of this case.

Petitioner first asserts that the court of appeals erred in declining to extend this Court's holdings authorizing

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3. We are aware of only two other trial court decisions that have addressed state regulation of Indian land use on fee lands in Indian country, and both decisions held, consistently with the holdings in this case, that such regulation could not be sustained. *See Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F. Supp. 349, 361-62 (D.R.I. 1995), *rev'd on other grounds*, 89 F.3d 908 (1st Cir. 1996); *Dunn v. Nez Perce County*, No. CV 95-00423 (2nd Jud. Dist., Idaho) (5-29-96 Opinion and Order) (CA Supp. Excerpts 65 at 28-50).

ad valorem taxation of Indian fee lands to permit county land use regulation on such lands. However, this Court itself refused to extend its property tax holdings to authorize excise taxes on the sale of Indian fee lands, and *no* court has extended those holdings to authorize wide-ranging land use regulations as advocated by Petitioner in this case. Petitioner concedes "there appears to be no federal authority" for its argument, Pet. 10, which seeks an "unprecedented extension" of existing law. Pet. App. 14a-15a.

Even if there were merit to Petitioner's argument, it would provide no basis for review in this Court. The claim that a single appellate decision erred in applying a properly stated rule of law to a novel factual setting is not sufficient grounds for *certiorari*. Moreover, Petitioner's argument lacks merit in any event; in declining to make an unprecedented extension of existing law, the court of appeals' decision did not conflict with any decision of this Court.

Likewise, Petitioner's assertion that the court of appeals erred in making a fact-bound determination that Petitioner failed to identify "exceptional circumstances" justifying county regulation does not provide a sufficient basis for granting the writ. Petitioner again seeks to extend this Court's decisions in an unprecedented manner, contending that decisions limiting tribal jurisdiction over *non-members* should be read to limit the importance of tribal self-government in a case involving jurisdiction over *tribal members*. No court has interpreted this Court's decisions in this manner.

Finally, Petitioner's concerns about land use regulation in *other, hypothetical* cases – such as cases involving mixed Indian and non-Indian landownership or development efforts,

cases in which the governing tribe has not enacted or enforced its own land use regulations, or cases involving truly extraordinary land uses such as nuclear waste repositories – are simply not presented here. Such concerns are best left to resolution by the involved tribes and affected state and local governments in the first instance and, if necessary, to further consideration by the lower courts. At this point, the nature and scope of the problem (if any) arising from on-reservation Indian development of Indian-owned fee lands and the full range of available solutions are uncertain. The very limited number of judicial decisions addressing this issue suggests that such development has not given rise to any important problems warranting intervention by the lower federal courts, much less this Court's review.[4]

I. *CERTIORARI* IS NOT WARRANTED BECAUSE PETITIONER CONCEDES THE NINTH CIRCUIT APPLIED THE CORRECT LEGAL TESTS AND THERE IS NO CIRCUIT CONFLICT.

In the lower courts, Petitioner "agree[d] that the law permits a state or local government to exercise jurisdiction over the on-reservation activities of tribe members only when doing so is expressly authorized by Congress, or when

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4. Although Petitioner asserts it has traditionally exercised jurisdiction over reservation fee lands without reference to tribal affiliation, Pet. 4, the record indicates otherwise. *See* CA Excerpts 71 at 8 (county hearing examiner has for some years taken the position that county has no land use jurisdiction over reservation fee lands owned by tribal members); CA Supp. Excerpts 65 at 27 (quite a few years ago county council, on advice of prosecuting attorney, concluded county did not have jurisdiction over fee lands owned by tribal members). The record does not reveal that this has resulted in any significant problems for the county.

'exceptional circumstances' justify the exercise of such jurisdiction." Pet. App. 24a, citing *Cabazon*, 480 U.S. at 214-16. The district court and the court of appeals applied the "express authorization" and "exceptional circumstances" tests to determine whether Petitioner could regulate Respondent Gobin's development. Pet. App. 12a-19a, 24a-30a. These are the same tests Petitioner advances here. *E.g.*, Pet. 6-7.

Petitioner does not challenge the use of these tests, but only their application to regulation of on-reservation Indian development of Indian fee lands in this case. Since Petitioner concedes that this is the first circuit court decision to address this issue, and that there is no conflict among the circuits (or state or district courts), Petitioner's assertion that the court of appeals erred in applying the correct rule of law to this particular factual setting falls far short of satisfying this Court's criteria for issuance of the writ. *See* SUP. CT. R. 10.

II. *CERTIORARI* IS NOT WARRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF THE "EXPRESS AUTHORIZATION" AND "EXCEPTIONAL CIRCUMSTANCES" TESTS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

A. "Express Authorization."

Petitioner argues that treaties and statutes authorizing the allotment of reservation lands to individual tribal members, and providing for the removal of restrictions on alienation of such lands, expressly authorize state and local governments to regulate the use and development of such lands. Petitioner also argues that the Burke Act of 1906,

which amended section 6 of the General Allotment Act and provided for the removal of "all restrictions as to sale, incumbrance, or taxation of [certain fee-patented] lands," expressly authorizes such land use regulation. Pet. 9-12.

Petitioner concedes that neither this Court nor any other court has ever so held, but contends that the court of appeals' rejection of these arguments "conflicts with the reasoning and import of *County of Yakima* and *Goudy v. Meath*, 203 U.S. 146 (1906)," two cases upholding the imposition of *ad valorem* property taxes on Indian fee lands. Pet. 10. However, in *Yakima*, 502 U.S. at 268-70, this Court itself declined to extend its property tax holding to authorize an excise tax on the sale of Indian fee lands. This case presented, for the first time, the issue whether the property tax holding should be more broadly extended to land use regulation of Indian fee lands. In the absence of any conflicting federal or state court decisions, the court of appeals' resolution of this novel issue does not warrant review in this Court.

Moreover, contrary to Petitioner's argument, the court of appeals' holding was entirely consistent with the "reasoning and import" of this Court's decisions. Citing *Goudy*'s discussion regarding alienability, Petitioner contends that

> [j]ust as it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from taxation, it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from zoning and development restrictions that apply to all other lands on the open market.

Pet. 11. However, when Congress provided for the removal of restrictions on alienation on Tulalip Reservation lands in the 1855 Treaty of Point Elliott, and when it enacted the General Allotment Act in 1887, there were no "zoning and development restrictions"; zoning regulation did not begin in this country until the turn of the century, over 45 years after the Treaty was made and over a decade after the General Allotment Act was enacted. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Moreover, unlike the *explicit* provision in the Burke Act proviso subjecting fee-patented reservation lands to taxation, there is no explicit provision in the Treaty of Point Elliott, the General Allotment Act, or any other law subjecting fee-patented reservation lands to zoning and development restrictions. And, as the Court held in rejecting the excise tax in *Yakima*, 502 U.S. at 268, the fact that Petitioner's argument may "be fully in accord with Goudy's emphasis upon the consequences of alienability" is not sufficient to sustain county regulation where such regulation is not unambiguously sustained by statutory language.

Petitioner also argues that its land use regulations are authorized "encumbrances of land" under the Burke Act. Pet. 11. However, because lands on the Tulalip Reservation were not allotted under the General Allotment Act, the Burke Act is not directly applicable here. *See United States v. Celestine*, 215 U.S. 278, 288-89, 291 (1909). Moreover, to the extent it sheds light on Congress' intent in the treaty and statutes that do apply to the Tulalip Reservation,[5] the Burke

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5. Neither the 1855 Treaty of Point Elliott nor the 1948 Act, under which restrictions on alienation were removed from the lands at issue in this case, provides for the removal of restrictions on "encumbrances" of land. *See* note 1 *supra*.

Act does not support Petitioner's argument. When the Burke Act was enacted, "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee" or "[a] claim, lien, or liability attached to property; as a mortgage, a registered judgment, etc." HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 613 (1st ed. 1891).[6] This definition does not fairly encompass general regulatory burdens, such as zoning and other land use regulations, since such regulations are not reasonably viewed as giving the state a "right to, or interest in, land," and they are not a "claim, lien or liability attached to property." Thus, it is likely that, in providing for the removal of restrictions on the "sale, taxation, or incumbrance" of land in the Burke Act, Congress intended only to authorize encumbrances such as liens, mortgages, leases and easements that would enable the fee-holders not only to sell their lands, but to convey property interests short of the full fee title. *Cf. Yakima*, 502 U.S. at 255 (noting that Congress ended the allotment era in 1934 without "impos[ing] restraints on the ability of *Indian allottees* to alienate or encumber their fee-patented lands") (emphasis added). The authorization of such encumbrances by Indian landowners is a far cry from the authorization of general regulatory burdens by state and local governments.

As *Yakima* makes clear, 502 U.S. at 268-69, even if the term "encumbrance" *could* be interpreted more broadly to encompass land use regulations, that would not be not sufficient to sustain Petitioner's position. Thus, while Petitioner notes, Pet. 11-12, that, in *Santa Rosa Band of*

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6. "Encumbrance" is defined in substantially the same way today. *See* BLACK'S LAW DICTIONARY 527 (6th ed. 1990).

Indians v. Kings County, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), the Ninth Circuit held that the prohibition on "encumbrances" in Public Law 280 included traditional land use regulations, it fails to note that the court found that the term "encumbrance" is *ambiguous* and, consistent with the Indian canons of construction, construed it to *prevent* state and local zoning regulation on trust lands. *Id.* at 667. The same canons dictate that the term "encumbrance," as used in the Burke Act, does not authorize state and local regulation of Indian-owned reservation fee lands. *See Yakima*, 502 U.S. at 269.

Moreover, as Judge Trott explained, "[d]espite the inherent ambiguity in the word 'encumbrance' standing alone, here the operative phrase is 'encumbrance *of land*.'" Pet. App. 16a (emphasis in original).

> The prepositional phrase "of land" necessarily limits the scope of permissible encumbrances. Encumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land, therefore, are not permitted.

Id., citing *Yakima*, 502 U.S. at 269. Since the county regulations at issue here do not burden the land itself, but rather the use to which Gobin seeks to put the land, they resemble the excise tax in *Yakima* and have not been expressly authorized by Congress. Pet. App. 16a-17a.

Petitioner's attempt to read the Burke Act proviso to authorize general land use regulations of fee-patented lands also suffers from the fact that, while Congress addressed general state and local regulatory authority in section 6 of

the General Allotment Act, this Court has held that those provisions do not apply to Tulalip allottees or to any Indian owners subsequent to original allottees. *See Celestine*, 215 U.S. at 288-89, 291; *Yakima*, 502 U.S. at 262. Petitioner seeks to avoid these holdings by analogizing land use regulations to the *ad valorem* property tax in *Yakima*, contending that "land use ordinances often regulate the condition of the land itself and authorize enforcement against the land without reference to persons." Pet 11. However, Petitioner does not contend that, under Washington law, liability for compliance with land use ordinances "flows *exclusively* from ownership of realty," or that such ordinances "create[] a burden on the property *alone*" – the grounds on which this Court upheld the *ad valorem* property tax. *See Yakima*, 502 U.S. at 266 (emphasis added).

It is eminently reasonable, as the court of appeals held, to view land use regulations as restrictions on the Indian's activity of using the land, just as *Yakima* viewed the real estate excise tax as a tax on the Indian's activity of selling the land. The fact that such restrictions may be *enforced* against the land, just as the real estate excise tax could be enforced against the land, does not change the result: because the restrictions limit the Indian's activity of using the land they are "void, whatever means may be devised for [their enforcement]." *Yakima*, 502 U.S. at 269.

Finally, Petitioner's argument would produce a result specifically rejected in *Yakima*, since it would validate "all sorts of state [regulation] of reservation-Indian activities" by merely targeting the regulation at the land. *Id.* For example, a state could prohibit the use of land for gaming purposes, the operation of Indian smoke shops, or other activities that this Court has held are beyond the permissible

scope of state regulation. *See Cabazon*, *supra*; *Moe*, *supra*. In rejecting such an approach in this case, the court of appeals' decision faithfully applied *Yakima* and does not conflict with any decision of this Court.

B. "Exceptional Circumstances."

Petitioner asserts that the court of appeals "misconstrues and misapplies the exceptional circumstances test" in "failing to discuss the nature of tribal sovereignty on unrestricted fee lands and by failing to discuss how County jurisdiction would impact actual federal and tribal interests in the regulation of private development on those lands." Pet. 13. Petitioner cites *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), for the proposition that tribal authority to impose zoning restrictions is diminished on reservation fee lands, and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), for the remarkable proposition that there is "no tribal interest" in development activities undertaken by tribal members on a reservation. Pet. 14-18. Petitioner then asserts that hypothetical problems that might arise from its inability to regulate development of Indian-owned fee land outweigh these allegedly diminished tribal interests. *Id.* at 19-22.

Neither *Brendale* nor *Colville* address the application of state or local land use regulations to tribal members on a reservation. In *Brendale*, the issue was tribal regulation of *non-members*, and *Colville* involved a requirement that Indian vendors collect cigarette taxes from *non-members*. This Court itself has limited the application of *Colville*, holding that it does not support state regulation of Indian gaming enterprises on a reservation. *See Cabazon*, 480 U.S. at 217-19.

Petitioner does not allege that any court has read *Brendale* or *Colville* to limit a tribe's interest in regulating the on-reservation development activities of tribal members. Further, Petitioner does not allege that the court of appeals' application of the exceptional circumstances test conflicts with the decision of any other federal or state court. Thus, even if Petitioner's interpretation of *Brendale* and *Colville* had merit, it would not warrant review in this Court. Once again, an allegation of error in a single appellate decision addressing a novel legal issue does not provide sufficient grounds for review in this Court. *See* SUP. CT. R. 10. Moreover, Petitioner's novel interpretation of *Brendale* and *Colville* lacks merit and, indeed, is in conflict with bedrock principles of this Court's Indian jurisprudence. The ability of tribal members to make their own laws and be governed by them lies at the heart of tribal self-government, and nothing in *Brendale* or *Colville* minimizes the importance of tribal self-government in this case.

Similarly, *certiorari* is not warranted to correct the lower courts' factual application of the exceptional circumstances test. The hypothetical problems identified by Petitioner were carefully considered by the lower courts, and provide no basis for overriding the important federal and tribal interests at stake here. Indeed, notably absent from the Petition (and the entire record in this case) is any suggestion that the modest development at issue here will have any material adverse impact on the county or its residents, let alone that it presents an "exceptional circumstance" warranting county regulation of the on-reservation activities of tribal members.

1. *Brendale* Does Not Support the Proposition that Tribal Jurisdiction over Tribal Members Is Diminished on Reservation Fee Lands.

Indian tribes are sovereign political entities with inherent jurisdiction over their *members* and their territory. *See, e.g.*, *Cabazon*, 480 U.S. at 207; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *United States v. Mazurie*, 419 U.S. 554, 557 (1975); *McClanahan*, 411 U.S. at 168-170; *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), the Court held tribes possess inherent sovereign power to prescribe and enforce laws applicable to tribal members, including criminal laws. No federal law has eliminated the tribes' jurisdiction over their members and the tribes have not lost this power implicitly. *Id.* at 324-26.

Although this Court has limited tribal jurisdiction over *non-members*, it has not, contrary to Petitioner's argument, diminished tribal jurisdiction over tribal members on fee lands. In *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997), the Court explained the rationale for limitations on tribal jurisdiction over non-members:

> In *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes lack criminal jurisdiction over *non-Indians*. *Montana v. United States*, [450 U.S. 544 (1981)], decided three years later, is the pathmarking case concerning tribal civil authority over *nonmembers*. . . . The Court said in *Montana* that the restriction on tribal criminal jurisdiction recognized in *Oliphant* rested on principles that support a more "general proposition." 450 U.S.

> at 565. In the main, the Court explained, "the inherent sovereign powers of an Indian tribe" – those powers a tribe enjoys apart from express provision by treaty or statute – "do not extend to the activities of *non-members* of the tribe." *Ibid.*

(Footnote omitted; emphasis added.) Significantly, as *Strate* pointed out, *id.* at 447 n.6, this limitation on tribal authority over non-members "figured prominently" in *Brendale*, where a divided court held that a tribe has authority to zone fee lands owned by *non-members* only if such lands comprise a small portion of the area in question, but not if they comprise a large portion thereof. *See* 492 U.S. at 438-47 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

In contrast to *Oliphant* and its progeny, *Wheeler* holds that tribes retain inherent sovereign authority, including *criminal* jurisdiction, over tribal members. As the Court stated in *Mescalero Apache Tribe*, 462 U.S. at 332, "[a] tribe's power to prescribe the conduct of tribal members has never been doubted. . . ." Thus, the "general proposition" derived from *Oliphant* regarding jurisdiction over non-members, which "figured prominently" in *Brendale*, has no application here.

In its most recent decision on the scope of tribal sovereignty, this Court reaffirmed the bedrock principle that tribal Indians have the right to make their own laws and be ruled by them. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). While the Court held that tribal control of land (either trust or fee land) might support tribal jurisdiction over *non-members* in some cases, it made no suggestion that land status had any bearing on tribal sovereignty and jurisdiction over

tribal members. *Id.* at 371-73; *see also id.* at 381 (Souter, J., concurring) (tribal jurisdiction "depends in the first instance on the *character of the individual* over whom jurisdiction is claimed, not on the title to the soil on which he acted") (emphasis added). In short, no decision of this Court (or any other court) restricts tribal jurisdiction over tribal members on reservation lands, regardless of the status of such lands as trust or fee lands. Petitioner's contrary and unprecedented interpretation of *Brendale* provides no basis for granting a writ of *certiorari*.[7]

2. *Colville* Does Not Minimize the Importance of Tribal Self-Government.

In 1959, in rejecting an assertion of state jurisdiction to adjudicate a civil dispute between a tribal member and a non-member which arose on a reservation, this Court held the controlling question is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Congress

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7. Because *Brendale* had no bearing on this case, there is nothing surprising about the fact that it was not cited in the court of appeals' decision. *Cf.* Pet. 15. Moreover, in suggesting that the court of appeals imposed a higher burden on Petitioner to demonstrate exceptional circumstances warranting state regulation on fee lands than trust lands, *id.*, Petitioner simply misreads the court's opinion. Petitioner conceded in the lower courts that it could not regulate the use and development of lands subject to federal restrictions on alienation, which comprise over half the reservation. Pet. App. 28a. It was entirely appropriate for the lower courts to consider Petitioner's conceded lack of jurisdiction on such lands in evaluating the interests it asserted in support of regulating unrestricted fee lands in this case. *See id.* at 18a, 28a. In considering this factor, the court of appeals did not place a higher burden on Petitioner to regulate fee as opposed to trust lands, or contravene any decision of this Court.

has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *id.*, and the Court itself has "consistently guarded the authority of Indian governments over their reservations." *Id.* at 223. Accordingly, where an assertion of state jurisdiction "would undermine the authority of the [tribe] over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," it is unlawful. *Id.*; *see also McClanahan*, 411 U.S. at 168-73.

In *Moe*, 425 U.S. at 468, the Court held Montana could not impose its cigarette taxes, personal property taxes, or vendor-licensing statutes on tribal members on the Flathead Reservation – on *fee* or trust lands – but upheld a state requirement that tribal smoke shops collect cigarette sales taxes from non-Indians. The Court found the State's interest in collecting its tax from non-Indians enjoying the State's off-reservation services sufficient to warrant the "minimal burden" imposed on the smoke shops. *Id.* at 483. It emphasized that the tax did *not* infringe on the Indians' right to make their own laws and be ruled by them, or otherwise frustrate tribal self-government. *Id.* The Court reaffirmed this holding in *Colville*, 447 U.S. at 156, 159.

In contrast, *Cabazon* held that California could not apply its gambling laws to tribal high-stakes bingo games that were open to the public and played predominantly by non-Indians. 480 U.S. at 204. The Court distinguished *Moe* and *Colville* because California's regulation would frustrate strong federal and tribal interests in tribal self-sufficiency and economic development. *Id.* at 217-19. The tribes were not "merely

marketing an exemption from state gambling laws." *Id.* at 220. Unlike the Indian cigarette vendors in *Moe* and *Colville*:

> the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Id. at 219. The Court concluded that even the State's legitimate interest in combating organized crime was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case." *Id.* at 221-22.

The court of appeals considered and fairly applied these precedents to the particular facts of this case. Pet. App. 17a-19a. The Constitution of the Tulalip Tribes was approved by the Secretary of the Interior under the Indian Reorganization Act, in which Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-[General Allotment Act] era." *Yakima*, 502 U.S. at 255. The Constitution expressly vests authority in the Tribes' governing body to regulate "the use and disposition of property upon the reservation." CA Excerpts 71 at 89. In approving the Tribes' zoning ordinance, the Bureau of Indian Affairs found it furthered the "broad purposes of federal self-determination policy in favor of establishing and supporting tribal authority to

regulate activities conducted on the reservation." *Id.* at 84.[8] The ordinance was designed to "fulfill the purposes of the Reservation as the permanent homeland of the Tulalip people." CA Excerpts 84 at 65. The particular provision at issue in this case, which permits greater residential densities than current county regulations but also requires more open space, was "required to provide adequate housing for present and future generations of Tribal members," while at the same time protecting fisheries and other vital natural resources on the Reservation. *Id.*; *see* CA Excerpts 72 at 4-5.

As the court of appeals found, Petitioner's attempt to impose its own regulations and thereby prohibit a residential development approved by the tribe "does not constitute a 'minimal burden' like the one condoned in *Moe*" and *Colville*, but instead "threatens to supplant the Tribes's Ordinances (and thus its attempt at self-government)." Pet. App. 19a. Petitioner's assertion of jurisdiction under these circumstances would interfere with the Indians' right "to make their own laws and be ruled by them," *Williams*, 358 U.S. at 220, and conflict with Congress' goal of Indian self-government.

Petitioner's assertion of jurisdiction would also be contrary to Congress' intent to preclude the extension of state laws to Indians on a reservation. *McClanahan*, 411 U.S. at 175. Having submitted subdivision and rezone applications

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8. This finding is consistent with repeated statements of this Court regarding the particular importance of tribal zoning authority. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.14 (2001) ("zoning 'is vital to the maintenance of tribal integrity and self-determination'"), *quoting Duro v. Reina*, 495 U.S. 676, 688 (1990); *Brendale*, 492 U.S. at 433 (Stevens, J.) ("[z]oning is the process whereby a community defines its essential character").

to the tribe and obtained approvals under the tribe's laws, Respondent Gobin would now be subjected to a second, overlapping and conflicting regulatory regime. This result cannot be squared with the deeply rooted policy of leaving reservation Indians free from state jurisdiction and control. *Id.* at 168.

Moreover, Respondent Tulalip Tribes showed – and Petitioner did not dispute – that the provisions under which the tribe approved the development in this case are essential to the tribe's ability to provide adequate housing on its reservation while still protecting the reservation's vital natural resources. CA Excerpts 72 at 4-5. Thus, Petitioner's assertion of jurisdiction threatens the central purposes for which the reservation was created in the Treaty of Point Elliott.

Petitioner's attempt to reduce the important federal and tribal interests in this case to the marketing of an unfair competitive advantage over non-Indian developers ignores the evidence in the record and the principles of Indian self-government that have been at the core of this Court's Indian jurisprudence. Like *Cabazon*, 480 U.S. at 219-20, this case involves the creation of substantial on-reservation value and the provision of important on-reservation services, including land use planning, zoning, permitting, inspections, housing design and construction, and utilities. Unlike *Moe* and *Colville*, the purchasers "do not simply drive onto the reservation[], make their purchases and depart," *Cabazon*, 480 U.S. at 219, but make the reservation their *home*. Because the tribe and its members "are generating value on the reservation[] through activities in which they have a substantial interest," *id.* at 220, the federal and tribal interests

here are of paramount importance. In so holding, Pet. App. 19a, the court of appeals' decision did not conflict with any decision of this Court.[9]

3. Alleged Error in the Factual Application of the Exceptional Circumstances Test Does Not Warrant *Certiorari.*

The Petition identifies no features of the development at issue in this case that would be harmful to Petitioner. Instead, it asserts that the application of the decision to other developments will create problems for states, counties and tribes. Pet. 19-22. However, the lower courts considered each of the hypothetical concerns advanced by Petitioner, and properly concluded that they do not present "exceptional circumstances" warranting county regulation of the on-reservation activities of tribal members *in this case.* This fact-bound determination does not warrant review in this Court.

Petitioner first asserts that as "a general proposition" administrative problems will result from a system in which zoning and land use jurisdiction shift between local and tribal governments based upon whether a member or non-member owns the land at any given time. Pet. 19. However, this is

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9. Petitioner's suggestion that only economic development activities undertaken by a tribe itself can further the congressional goal of Indian self-sufficiency and economic development, Pet. 16 n.4, 17 n.5, is premised on an erroneous, socialistic conception of modern Indian tribes. The entrepreneurial activities of individual tribal members, undertaken on a reservation subject to tribal regulation, can further and may well be essential to the achievement of the twin goals of Indian economic development and self-sufficiency.

the inevitable consequence of this Court's jurisprudence regarding jurisdiction on Indian reservations. *See, e.g.*, *Yakima*, 502 U.S. at 265 (noting that *Brendale* affirmed "checkerboard" with respect to zoning power over reservation *fee* land). And, as the record in this case demonstrates, any resulting administrative problems can be addressed by inter-governmental efforts to coordinate zoning and land use regulations, and to provide notice and an opportunity to comment on land use applications (such as the notice provided to Petitioner in this case). *See* Pet. App. 19a (noting "similarities between County and tribal land use regulations"); CA Excerpts 71 at 120 (Memorandum of Agreement between Petitioner and Respondent Tulalip Tribes providing for notice to "one another . . . of pre-application or other development proposals").

Second, Petitioner asserts that tribal members and non-members could engage in sham transactions to circumvent land use restrictions, and that this would be especially problematic on "reservations where the resident tribe has no land use code, or no ability to enforce its code." Pet. 19-21. Petitioner does not suggest that these circumstances are present here, and it recognizes that tribal and non-tribal governments have a mutual interest in preventing such transactions. Although Petitioner asserts that "neither a county nor a tribe may confer jurisdiction on the other by agreement," *id.* at 20, it does not explain why counties and tribes cannot work together to notify each other of potential sham transactions and take enforcement actions to prevent them.

Finally, Petitioner asserts it is difficult to determine whether a tribal member owns or has some legal interest in a particular parcel of land. Pet. 21. Again, Petitioner makes no

suggestion that it encountered any such problem in this case, and it submits an extra-record document that confirms its ability to determine tribal membership status by simply asking the tribe. *See* Pet. App. 46a (¶ 5). Since states, counties and tribes have mutual interests in insuring compliance with land use regulations, there is no reason to believe this concern cannot be addressed through cooperative inter-governmental arrangements.

Under these circumstances, the lower courts' factual determination that Petitioner did not demonstrate the existence of "exceptional circumstances" justifying a departure from "the well-established policy of leaving Indians free from state jurisdiction and control," Pet. App. 19a, 30a, does not merit review in this Court.

III. *CERTIORARI* IS NOT WARRANTED BECAUSE THIS CASE DOES NOT PRESENT A SUFFICIENTLY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT IN THE ABSENCE OF FURTHER CONSIDERATION IN THE LOWER COURTS.

As Petitioner concedes, the court of appeals' decision in this case is the first federal or state appellate decision to address state or local regulation of Indian development of Indian-owned fee lands in Indian country. Indeed, as noted above (note 3) we are aware of only two other trial court decisions that have addressed the issue, both of which concluded that such regulation could not be sustained.

The very limited amount of litigation on this narrow issue of federal Indian law counsels against plenary review in this Court at this time, particularly in a case in which the development at issue will have no material adverse impact on the county or its residents. Because tribes have limited jurisdiction over non-members, and state and local governments have limited jurisdiction over tribal members, many tribes and local governments are entering into cooperative agreements to address land use issues in Indian country. The paucity of litigation suggests their efforts have been successful in avoiding jurisdictional conflicts. In the event such conflicts do develop, they should be addressed first in the lower federal and state courts. Those courts are best equipped to consider varying patterns of land ownership, issues arising from joint Indian – non-Indian development efforts, and the consequences of particular development projects, and they are in the best position, at least in the first instance, to make fact-bound determinations of "exceptional circumstances."

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

SNOHOMISH COUNTY; STEPHEN HOLT, Director, Snohomish County Department of Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON; THE TULALIP TRIBES OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF SKAGIT COUNTY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37(c), Skagit County respectfully submits this brief amicus curiae in support of petitioner, Snohomish County. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of the consent letters have been lodged with the Clerk of the Court.

Skagit County is located in the northwest portion of Washington State and is one of the state's fastest growing areas. Three federally recognized Indian Tribes have reservations within the boundaries of Skagit County: the Swinomish Tribe, the Sauk-Suiattle Tribe, and the Upper Skagit Tribe. A fourth tribe, the Samish Tribe, currently has pending before the Bureau of Indian Affairs a proposal to transfer approximately seventy-five acres located in Skagit County from fee status to federal ownership in trust. If the proposal is granted, the Samish Tribe is likely to seek reservation status. Because of the presence of the reservations within the County and the pressures of the County to comply with state and federal environmental regulations, Skagit County has a substantial interest and stake in the determination of whether it can exercise *in rem* zoning and land use jurisdiction over reservation land held in fee by tribal members.

The opinion below holds that a state or local government cannot zone or impose land use regulations against reservation fee lands when tribal members own those

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[1] Pursuant to Supreme Court Rule 37(6), counsel for amicus authored the brief in whole. Amicus solely funded the preparation and filing of this brief.

lands in unrestricted fee simple. As a result, the lower court's ruling stands for the proposition that a state and local government's authority to assert land use jurisdiction will turn on whether a tribal member or nonmember owns the land at any given time, despite the land being fully alienable and encumberable. Amicus believes that the ruling below severely impacts how local and state governments can consistently enforce state and federal land use regulations.

STATEMENT OF THE CASE

This case involves the question of whether state and local governments have authority to zone or impose land use regulations on reservation fee land when a tribal member owns the land in unrestricted fee simple.

In this case, Kim Gobin, a registered member of the Tulalip Tribes of Washington, owns a twenty-acre parcel of land located on reservation land in conventional fee simple. In 1962, restrictions on its sale, encumbrance and taxation were removed.

In 1999, Gobin submitted to the Tribes an application to rezone and construct twenty-five single-family homes on the parcel. The application did not seek to build tribal housing, but would instead be marketed to the general public. Indeed, based on current trends, it was likely that non-tribal members would purchase many of the homes.

The Tribes conditionally approved the project.[2] Snohomish County does not assert jurisdiction over any restricted lands held in trust; however, this land was not held in trust, but in fee simple, and the County asserted its jurisdiction. Under Snohomish County's density regulations, Gobin would only be allowed to construct ten homes instead of the proposed twenty-five.

Gobin sought a declaratory judgment that the County lacked land use jurisdiction over her land since she is a tribal member. The Tribes intervened, also seeking a declaration that the County lacked jurisdiction.

The Court of Appeals for the Ninth Circuit held that Snohomish County lacked land use jurisdiction over Gobin's land. The court reasoned that Congress had not expressly authorized County regulation of reservation fee lands owned by tribal members. *Gobin v. Snohomish County*, 304 F.3d 909, 916 (9th Cir. 2002). The court also held that there were no "exceptional circumstances" allowing the assertion of state jurisdiction over the on-reservation activities of tribal members. *Id.* at 917-18.

The issue presented for this Court's resolution is whether reservation fee land which is freely alienable and encumberable can escape state or local government land use regulation. It also presents the important question of when exceptional circumstances will justify a county exercising jurisdiction over reservation fee land when owned by a tribal member.

---

[2] The conditions are unrelated to the issues involved in this case.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a United States court of appeals has decided a federal question that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Both of these grounds for review are present in this case.

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *COUNTY OF YAKIMA*

The Ninth Circuit's decision ignores the principles of *in rem* jurisdiction on fee land established by this Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

The question presented in *County of Yakima* was whether the County of Yakima could impose an *ad valorem* tax on so called "fee-patented" land located within the Yakima Indian Reservation, as well as an excise tax on sales of such land. This Court reasoned that a fee patent would not subject a tribal member to plenary state jurisdiction, but fee ownership would free the land of "all restrictions as to sale, encumbrance or taxation." *Id.* at 264. In the opinion, this Court drew a distinction between *in rem* and *in personam* jurisdiction and maintained that there was no impediment, statutory or otherwise, to a state's *in rem* jurisdiction over lands patented in fee. *Id.* at 264-266.

This Court reached this conclusion based on Sections 5 and 6 of the General Allotment Act ("GAA"). The Court reasoned that both sections manifested a clear intent to allow states to tax fee patented land based on *in rem* jurisdiction over the land. Section 5 of the GAA provided that "at the expiration of the trust period, the United States will convey [the land] by patent to [the] Indian . . . in fee, discharged of [the trust] and free of all charge or incumbrance. . . . " 25 U.S.C. § 348. Section 6, as amended by the Burke Act, stated that when the lands have been conveyed in fee to the Indians, "then each and every allottee shall have the benefit of and be subject to the laws, both criminal and civil, of the State or Territory in which they may reside. . . . " 25 U.S.C. § 349.

Gobin's land was not patented in fee under the GAA, but rather under the Treaty of Point Elliott. Nevertheless, the allotment policy under the Treaty was consistent with the later enacted GAA. *See Lummi Indian Tribe v. Whatcom County,* 5 F.3d 1355 (9th Cir. 1993). Although the GAA is not directly applicable to Gobin's land as noted by the Ninth Circuit, the GAA shows Congressional intent to allow state and local jurisdiction regardless of ownership of the land as long as the land was not still owned by the federal government and held in trust.

Public Law 280 and Wash. Rev. Code ch. 37, the state statutory chapter implementing Public Law 280, also indicates Congress' intention that Snohomish County has *in rem* jurisdiction over Gobin's land. RCW 37.12.010 gives

the State of Washington jurisdiction over all fee patent lands within Indian country.[3]

> The state of Washington hereby obligates and binds itself to assume criminal and **civil jurisdiction over** Indians and **Indian territory, reservations**, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation **and held in trust** by the United States, unless the provisions of RCW 37.12.021 have been invoked.

RCW 37.12.010 (emphasis added).

Gobin's land is not held in trust by the United States, nor has the United States imposed any restriction against alienation.

> The most significant feature of the [amended RCW 37.12.010] was its provision for the extension of at least some jurisdiction over all Indian lands within the State, **whether or not the affected tribe gave its consent**. Full criminal and civil jurisdiction to the extent permitted by Pub.L. 280 was extended to all fee lands in every Indian reservation and to trust and allocated

[3] Public Law 280 is codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, and 28 U.S.C. § 1360.

> lands therein when non-Indians were involved. . . .

State v. Cooper, 928 P.2d 406 (Wash. 1996).

The Court below dismissed arguments based on Public Law 280 by noting that in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1976), the Ninth Circuit concluded that zoning was not applicable to Indian Reservation trust lands. Critically, the land in question in *Santa Rosa* was trust land, not fee land. It is undisputed that counties have no authority to regulate land which is owned by the federal government in trust for a tribe. *Puyallup Tribe Inc. v. Department of Game of State of Washington*, 433 U.S 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). However, once the land is released from the trust, it is fully subject to the laws and regulations of the state and county, as is any other land.

This Court has limited the authority of a state[4] to exercise civil jurisdiction under Public Law 280 on an Indian reservation. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). That case, however, is distinguishable from the present case because it involved state regulation of the activities of the tribes themselves, not the regulation of fee land which is owned by a member of a tribe. Here, Snohomish County is not regulating the activities of the Tribe.

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[4] In Washington, counties are arms of the state. *State ex rel. Spokane v. DeGraff*, 143 Wash. 326, 255 P. 371 (Wash. 1927).

The Ninth Circuit decision is also at odds with another opinion from that circuit. In *Dillon v. Antler Land Company of Wyloa*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975), the Ninth Circuit held a tribal member was subject to Montana state law because she owned the land in fee, not trust. The Ninth Circuit based its decision on the plain language of section 25 U.S.C. § 349 and, since the land was freely alienable, it was subject to the laws of the State of Montana.

This Court should review the decision of the Ninth Circuit because it conflicts with the express *in rem* jurisdiction granted to state and local governments over reservation fee lands recognized by this Court's decision in *County of Yakima*.

II.

THE DECISION BELOW IGNORES THE EXCEPTIONAL CIRCUMSTANCE TEST ESTABLISHED BY THIS COURT

After concluding that Congress has not expressly authorized county regulation of reservation fee lands owned by tribal members, the Ninth Circuit held that there were no "exceptional circumstances" permitting the assertion of state jurisdiction over the activities of tribal members on reservation land. *Gobin*, 304 F.3d at 917-18.

The Ninth Circuit opinion almost eviscerates the "exceptional circumstances" test set forth by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212-214, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). Specifically, the Ninth Circuit readily dismissed Snohomish County's interests that it claimed were "exceptional

circumstances," including protecting endangered species, regulating County-maintained roads and storm sewers, providing a continuum of land use enforcement for all fee lands, and complying with applicable health and safety codes. *Id.* at 917. In rejecting these circumstances, the opinion fails to include any analysis of how the County's jurisdiction of fee lands would interfere with the Tribe's governance of its reservation.

The decision ignores one of the underpinnings of the "exceptional circumstances" test set forth in *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). That case upheld state regulation of tribal members' hunting and fishing activities in the Puyallup River both on and off its reservation. Critically, a basis for finding state regulation applicable to tribal members was that the tribe "alienated, in fee simple absolute," all lands in which the Puyallup River flowed.

The Ninth Circuit opinion assumes the County's position would jeopardize tribal sovereignty. However, it ignores the limited role of tribal sovereignty on unrestricted fee lands which was set forth in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L. Ed. 343 (1989). At issue in *Brendale* was whether a tribe has the authority to zone particular tracts of land within its boundaries of the reservation owned by nonmembers. In a plurality opinion, this Court held that a tribe does not have authority to impose zoning restrictions on land owned by nonmembers. Therefore, the Tribe's interests in regulating fee land is already diminished.

According to the Ninth Circuit, it is hard to imagine what would constitute exceptional circumstances. This Court should grant the petition for certiorari in this case to resolve this issue.

III.

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues involved. At a minimum, the outcome of this case will impact all reservation fee land located within the Ninth Circuit. However, it is more likely it will impact every county government in the nation because it will be relied on by other jurisdictions.

The lower court's decision creates the absurd result that zoning and land use regulation over reservation fee land may constantly shift based on ownership of the land at a given time. In *County of Yakima*, this Court reasoned that a county's ability to tax fee land stems directly from its alienability because it would be "strange to withdraw protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation." *County of Yakima*, 502 U.S. at 263.

The reasoning that a County may exercise *in rem* jurisdiction on fee land relating to taxation is equally applicable to *in rem* zoning and land use restrictions. It would be just as strange to allow a tribal member to sell his fee land without restriction while exempting the land

from zoning and land use regulation that apply to all other development.

As a practical matter, whether a state or local government can exercise jurisdiction over tribal land should be determined based on whether the land is owned in fee simple or held in trust. This system makes more sense given its easy application. A state or local government can easily determine if land is held in fee versus trust and know whether they can exercise jurisdiction over the land. In addition, the system is more manageable because ownership of fee land can change quickly while land held in trust must go through an extensive process to be converted to fee land.

In sharp contrast, the Ninth Circuit's decision makes the applicability of County land use regulations depend upon the status of the owner of the land in relation to the tribe. A parcel of land may be sold to or from a tribal member instantaneously. When it comes to enforcing land use regulations, counties will have a difficult time determining who is the owner at the moment enforcement is necessary and whether that person is currently a tribal member. This creates a negative incentive for counties to enforce any land use regulation within reservations, even on the fee land of nontribal members which is clearly not subject to tribal regulation. *Brendale*, 492 U.S. at 428.

The Ninth Circuit opinion also encourages non-tribal members to conditionally transfer land to tribal members who could develop the property under more lenient tribal zoning laws. Once the permit approvals were obtained, the land could be transferred back to the non-tribal member. The encouragement of those types of dealings is bad government, bad planning, and bad law.

Thus, this Court should grant review to settle an important question of federal constitutional law impacting a significant segment of the population and the implementation of public policy and regulation.

CONCLUSION

Whether a state or local government can exercise *in rem* zoning and land use jurisdiction over reservation fee land held by a tribal member is an issue needing definite resolution by this Court. Review is also necessary so that this Court can finally resolve the important question of law left unanswered by *County of Yakima* and *Brendale*. Amicus respectfully urges this Court to grant the petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

DATED: February 6, 2003.

Respectfully submitted,

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Supreme Court of the United States

SNOHOMISH COUNTY; STEVEN HOLT,
Director, Snohomish County Department of
Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON;
THE TULALIP TRIBES OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE TOWN OF LAC DU FLAMBEAU, WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Town of Lac du Flambeau, Wisconsin (the "Town") is an unincorporated township created pursuant to 1999-2000 Wisconsin Statutes, § 60.01 and Wisconsin Constitution, Art. IV, § 23. Lac du Flambeau is located in Vilas County, a county located in northern Wisconsin, bordering the upper peninsula of Michigan. Lac du Flambeau includes within its boundaries the majority of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") Reservation. The Tribe is a federally recognized Tribe and the reservation encompasses more than 50,000 acres of land located in parts of Vilas, Iron and Oneida Counties. Approximately 50% of the reservation land is held in trust by the United States for the Tribe or individual tribal members or in a restricted fee status because the Tribe repurchased the land after its transfer to nonmembers. The remaining 50% of the reservation is owned by nontribal and tribal members in unrestricted fee simple. The assessed value of fee land owned by tribal members exceeds two million dollars and that ownership is scattered throughout the reservation. Nonmember owned fee land is likewise scattered throughout the reservation. The Town includes more than one hundred lakes within its boundaries, and is a popular vacation retreat for residents of several midwestern cities. Access to lands throughout the Town is freely obtained over a road system operated and maintained primarily by the Town.

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[1] The Town of Lac du Flambeau has secured the consent of all of the parties to the proceeding in the Court of Appeals and letters of consent are attached to this Brief. No party has authored any part of this Brief. Lac du Flambeau has paid for the legal fees and costs associated with the filing of this Brief.

The Town has a comprehensive ordinance governing zoning and land use for the entire township (the "Ordinance"). Lac du Flambeau has never attempted to enforce the Ordinance against non-fee simple land. The Tribe does not have a zoning ordinance. The Ordinance regulates land uses, sizes of parcels, lake and river classifications and prohibits contamination of land. Exclusive enforcement of the Ordinance lies with the Town.

Recently, while attempting to enforce the Ordinance, the Town has encountered challenges to its jurisdiction on reservation fee lands owned by tribal members. Because the Tribe has no ordinance regulating land use or zoning, individual tribal members are choosing to locate businesses on or extract natural resources from reservation fee land and develop said land in a manner which would be prohibited or regulated if attempted by nonmember fee owners. This distinction is problematic for several reasons. First, where member owned fee land adjoins nonmember owned fee land development in contravention of the Ordinance defeats or undermines the objectives of the Ordinance. Second, the difference in treatment of fee owned land offers incentives to members to develop fee lands in a manner prohibited by the Ordinance. Third, members seek to profit therefrom by selling such developed land to nonmembers who accept it in its developed state. Fourth, enforcement problems exist in determining jurisdiction because of joint ownership by married couples which include both tribal and nontribal members.

STATEMENT OF THE CASE

The Town of Lac du Flambeau, Wisconsin adopts the Statement of the Case in the Petition for a Writ of Certiorari filed by Petitioners.

SUMMARY OF ARGUMENT

1. This case presents a critical question concerning whether tribal members should be permitted to circumvent the application of local governmental land use regulations to their reservation fee lands based upon the tribal member's sole prerogative. In situations where Tribes do not have zoning or land use regulations, an incentive exists to motivate members to develop fee land without compliance with local nontribal regulation. Members have the option, pursuant to the Indian Reorganization Act, 25 U.S.C. § 465, of placing fee land into trust with the United States, thereby exempting it from local regulation. Disparate regulation of fee lands demonstrates that there could be as many different outcomes in the country as there are counties, towns, tribes and reservations. Those contradictions create substantial confusion, inhibit the reasoned imposition of land use and zoning regulations and permit abuse of member status for fee owned land.

2. This Court should accept the Petition for Writ of Certiorari because towns like Lac du Flambeau need to be able to rely on brightline standards in order to carry out their responsibilities to their electorate. If a local jurisdiction can be manipulated in its attempts to regulate land use, then local governments will face significant land use and environmental problems with limited tools to address these problems after the fact. Enforcement action in

communities which is thwarted by tribal member ownership of fee lands demonstrates that this is a national and widespread problem affecting the fundamental division of authority between Tribes and local governmental entities.

ARGUMENT

I. Principal of *In rem* Jurisdiction.

The decision by the Ninth Circuit places exclusive zoning and land use jurisdiction over reservation fee land in the hands of member owners. The decision should be evaluated in light of the Court's decision in *County of Yakima v. Federated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In *County of Yakima*, the Court expressly left open the state's jurisdiction with respect to fee patented land:

> While the Burke Act proviso does not purport to describe the entire range of *In rem* jurisdiction states may exercise with respect to fee-patented reservation land, we think it does describe the entire range of "*jurisdiction to tax*." And that description is "taxation of . . . land."

County of Yakima, 502 U.S. at 268.

The quoted language states that *In rem* jurisdiction exists beyond the power to tax. At issue here is whether zoning or land use regulations constitute an authorized encumbrance of land under Sections 5 and 6 of the Indian General Allotment Act of 1887 (as amended and codified at 25 U.S.C. §§ 348 and 349).

Applying the reasoning that *In Rem* jurisdiction includes the zoning or land use regulation is a reasonable extension of *County of Yakima*. It is the *In Rem* status that

must be emphasized and not the concept of alienation as relied upon by the Court of Appeals. *Gobin v. Snohomish County*, 304 F.3d 909, 917 (9th Cir. 2002). The Court should grant the Petition to evaluate the relationship between *In Rem* jurisdiction and land use regulation. The ability to alienate fee land should be subject to the Petitioner's right to restrict the land by zoning ordinance.

II. Meaning of Encumbrance.

The Court of Appeals found that the term "encumbrance" was inherently ambiguous and that the prepositional phrase "of land" limited the scope of permissible encumbrances. 304 F.3d 909, 916. Because a land use regulation does not burden land itself but rather, burdens uses to which land is put, the Court of Appeals concluded that land use regulations resembled excise taxes in *County of Yakima* and were not inextricably linked to the land itself. 304 F.3d 909, 917. The Court of Appeals applied the same analysis to the words "taxation of land" as the words "incumbrance of land." However, encumbrance has a different meaning than taxation. The analogy to the excise tax in *County of Yakima* is unwarranted. It fails to analyze the difference between taxation and encumbrance of land.

The analysis ignores the fact that land use ordinances regulate the land itself and permit enforcement against the land regardless of ownership. This Court should examine the word encumbrance and interpret its meaning to include land use regulations and restrictions as suggested by *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 667 n.20 (9th Cir. 1975), *cert. denied*, 429

U.S. 1038 (1977). If a land use regulation does not constitute an encumbrance of land, it is difficult to conjure what does.

III. Exceptional Circumstances Test.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-220, the Court examined in detail the tribal interests connecting those interests to the economic livelihood of the Tribe. Based upon that finding, the Court concluded that self-determination and economic development, both congressional goals, could not be achieved if state regulation of bingo games was permitted. The analysis by the Ninth Circuit in this case did not follow that approach. The balancing test that appears to be required by *Cabazon Band* was never applied. The Court of Appeals did not analyze tribal interests of Indian sovereignty, tribal self-determination, self-sufficiency and economic development. Instead, the Court established the Tribe's interests to be overwhelming without evaluation and minimized the Counties' interests. 304 F.3d 909 at 918.

The evaluation of exceptional circumstances which was set forth in *Cabazon Band* included an exhaustive examination of the important federal interests involved and the significance of those interests to the self-determination and economic development of the Cabazon and Morongo Reservations. 480 U.S. at 219. The decision of the Court of Appeals fails to evaluate either tribal interests or federal interests which would be advanced by preventing the application of the County zoning ordinance to the plaintiffs. The analysis also failed to consider the difference between fee land and non-fee land in terms of

tribal interests. Fee land is unfettered by tribal regulation if it is owned by a tribal member. Non-fee land is frequently controlled directly or indirectly by the Tribe without necessity for zoning rules and land use regulations. Those distinctions could be decisive in a *Cabazon*-type evaluation.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), this Court held that tribal sovereignty is diminished on fee lands. This Court ruled that the impact of challenged uses had to be evaluated in terms of their impact upon political integrity, economic security, or the health and welfare of the Tribe. The *Brendale* decision suggests that the impact of local zoning on fee land must be serious and imperil the political integrity, economic security, or health and welfare of the Tribe in order for local zoning to be exercised. That analysis is lacking in the Court of Appeals' decision here.

IV. Impact of Court of Appeals' decision upon local municipalities.

Members who purchase and develop fee land on reservations can, by doing so without compliance with local zoning rules, adversely affect the autonomy of the reservation. This occurs because prices of fee land increase relative to the profits that could be generated due to non-regulated development. If reservation fee land prices increase, then the cost to other tribal members or the Tribe itself would likewise increase. This result could undermine the ability of Tribes to reacquire fee land or to attract nonresident members back to the reservation.

Permitting tribal members to develop fee land without restriction could jeopardize neighborhood, environmental,

health and safety, or other public values deemed essential by the community. The injurious effects would be felt by Tribes and communities alike.

Fee land is routinely bought and sold within reservation boundaries to members and nonmembers alike. Consequently, on most reservations an active market exists for this property. Conversely, for non-fee land virtually no market exists because that property does not change hands and historically remains in trust for the Tribe or individual tribal members. As a result, a natural distinction exists in everyday activity between fee land and non-fee land on most reservations. This distinction is recognized by activities of appraisers, realtors, contractors and assessors. This distinction exists and is well established in the day-to-day patterns of activity on reservations throughout the country. In *Brendale*, this Court recognized that in that case:

> "zoning authority could vest variously in the county and the Tribe, switching back and forth between the two. . . . Uncertainty of this kind would not further the interests of . . . the Tribe . . . and would be chaotic for landowners."

Brendale at p. 430.

Uniform application of land use and zoning regulations to all reservation fee lands would further interests of Tribes and local governments. Such enforcement would be easily explained and understood by the public.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS KIM GOBIN AND GUY MADISON

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This case involves the efforts of Petitioner Snohomish County to regulate Indian development of Indian-owned fee lands within the Tulalip Indian Reservation in the State of Washington. The Ninth Circuit, in a unanimous opinion by Judge Stephen S. Trott, rejected Petitioner's argument that Congress expressly authorized such regulation as an "unprecedented extension" of existing law. Pet. App. 14a-15a. As Petitioner essentially acknowledges, the court of appeals' decision does not conflict with the decision of any other federal circuit court, any federal district court or any state court. Nor does it conflict with any decision of this Court or present a recurring legal issue: with the exception of this case, state authority to regulate Indian land use on Indian-owned fee lands in Indian country has been considered in only two trial court decisions (both of which held such regulations could not be sustained). Thus, this case involves only the unexceptional and correct application of well settled principles of law in a factual setting that rarely gives rise to litigation. This Court's review is unwarranted.

STATEMENT OF THE CASE

Respondent Kim Gobin, an enrolled member of a federally recognized Indian tribe (Respondent Tulalip Tribes), owns a 20-acre parcel of land within the Tulalip Reservation in fee simple. Pet. App. 5a; CA Excerpts 71 at 112.[1] Gobin

1. Lands on the Tulalip Reservation were allotted to tribal members, subject to restrictions on alienation, under the Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855). *See* Pet. App. 11a. The restrictions on alienation of the land at issue in this case were extended in 1934 by the Indian Reorganization Act, *see* 25 U.S.C. §§ 462, 464, but were removed in 1962 pursuant to the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483. The 1948 Act authorized (Cont'd)

and her brother (Respondent Guy Madison), also an enrolled member of the tribe, seek to develop a routine, 25-home residential subdivision on her land. Pet. App. at 6a-7a.

The tribe has a comprehensive tribal land use ordinance, which was designed to balance the need for housing and the preservation of natural resources on the reservation, in order to fulfill the purposes of the reservation as the tribe's homeland. *Id.* at 6a; CA Excerpts 84 at 64-66. The ordinance was approved by the Secretary of the Interior. Pet. App. 6a.

Gobin submitted an application to the tribe to subdivide and rezone the lands pursuant to the tribe's land use ordinance. *Id.* at 6a-7a. The tribe's professional staff reviewed the application, solicited comments from the county, and recommended that the application be approved with conditions. *Id.* at 7a; CA Excerpts 71 at 5-6, 111-18. The tribe's planning commission held a public hearing on the application, and also recommended that it be approved with conditions. Pet. App. 7a; CA Excerpts 71 at 5-7, 112, 130. The tribe's governing body formally approved the application at an open meeting based on the recommendations of the tribe's professional staff and planning commission. Pet. App. 7a.

In response to the tribe's request for comments, the county made *no* substantive objection to any aspect of the proposed development and did not seek to impose *any*

(Cont'd)
the Secretary of the Interior, "upon application of the Indian owners, to issue patents in fee, to remove restrictions on alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the [Indian Reorganization Act]."

conditions on it. *Id.* Neither the county nor anyone else opposed the development at the public hearing held by the tribe's planning commission or at any other stage of the tribe's land use process. *Id.*

County regulation would subject Gobin to a second regulatory process and, in conflict with the tribe's land use ordinance, the recommendations of the tribe's professional staff and planning commission, and the decision of the tribe's governing body, would prohibit the proposed residential development because it exceeds allowable housing densities under the county's zoning ordinance. *Id.* Gobin and Madison filed suit against the county seeking a declaratory judgment that the county lacked jurisdiction to regulate their planned development, and the tribe intervened as a plaintiff. *Id.* at 23a. The district court (Lasnik, J.), adhering to the deeply rooted policy of leaving Indians free from state jurisdiction and control, held that the county could not regulate the residential development at issue in this case. Pet. App. 30a, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

In the court of appeals,[2] Petitioner relied extensively on *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). In *Yakima*, the Court held that a State is without power to tax reservation lands and reservation Indians unless congressional intent to allow such state action is "unmistakably clear." The Court then held that, in authorizing the removal of restrictions on alienation of Indian lands in sections 5 and 6 of the General Allotment

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2. The United States submitted a brief and argued in the court of appeals as *amicus curiae* in support of Gobin, Madison and the tribe.

Act, 25 U.S.C. §§ 348 & 349, Congress had clearly authorized the imposition of *ad valorem* property taxes on such lands. 502 U.S. at 263-66. However, the Court also held that the removal of restrictions on alienation did *not* authorize imposition of excise taxes on the sale of Indian lands. *Id.* at 268-70. In so holding, the Court emphasized that an excise tax was not a "taxation of land" as that term was used in the General Allotment Act, because an excise tax is a tax on the activity of selling land rather than a tax on the land itself. *Id.* at 269.

The court of appeals (Brunetti, *Trott* and Tallman, JJ.) faithfully applied *Yakima*. It recognized, for example, that both this Court and prior panels of the Ninth Circuit had reaffirmed the holding that, in making reservation lands alienable, Congress made unmistakably clear its intent to subject the lands to state and local taxation. Pet. App. 13a-14a, discussing *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-15 (1998), and *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993). However, the court of appeals also recognized correctly that neither this Court nor the Ninth Circuit "has extended *County of Yakima* to find that Congress expressly authorized any other State regulation of the Indians when it made Indian fee lands freely alienable." Pet. App. 14a.

The court of appeals rejected the "unprecedented extension" of *Yakima* sought by Petitioner on two grounds. *Id.* at 14a-15a. First, it held that "Congress's decision to make Indian fee lands freely alienable is not an express authorization or otherwise an 'unmistakably clear' indication that the County may enforce its in rem land use regulations over those lands," since "[u]nlike the inextricably linked concepts of (forced) alienation and taxation found in *County*

of Yakima, alienation and plenary in rem land use regulation are entirely unrelated." *Id.* at 15a. Second, just as the section 6 proviso authorized only "taxation of lands," it permits only "encumbrances of lands," not "[e]ncumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land." *Id.* at 16a. As Judge Trott explained:

> In this case, the County's land use regulations, which prohibit Gobin from building her subdivision, encumber the transactions and activities involving land. The objectionable County density requirement, in particular, does not burden the land itself, but rather burdens the use to which Gobin seeks to put the land. Indeed, apart from Gobin's proposed activities, the County's land use regulations have no force. These regulations resemble the excise tax in *County of Yakima*: Although tangentially related to land, they are not inextricably linked to the land itself.

Id. at 16a-17a.

The court of appeals also rejected Petitioner's argument that, under *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987), this case presented "exceptional circumstances" justifying county jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional authority for such jurisdiction. Pet. App. 17a-19a. The court found that the assertion of county jurisdiction threatened to supplant the tribe's ordinances "and thus its attempt at self-government." *Id.* at 19a. This was not a "minimal burden" like the one condoned in *Moe v. Confederated Salish & Kootenai Tribes*,

425 U.S. 463, 483 (1976), but was directly contrary to the well-established policy of leaving Indians free from state jurisdiction and control. Pet. App. 19a. Even considering the county's interests collectively, the court found they did not "outweigh the [tribe's] interest in self-determination." *Id.*

Petitioner did not seek rehearing or *en banc* consideration in the court of appeals, but now seeks a writ of *certiorari* from this Court.

REASONS FOR DENYING THE PETITION

No other federal or state appellate court has addressed state or local regulation of on-reservation Indian development on Indian-owned fee lands. Petitioner does not allege that the Ninth Circuit's decision conflicts with the decision of *any* federal circuit court, *any* state court, or *any* federal district court.[3] Moreover, Petitioner does not challenge the legal tests employed by the Ninth Circuit to determine whether a county may regulate Indian activities on an Indian reservation. Petitioner challenges only the *application* of those tests to the particular circumstances of this case.

Petitioner first asserts that the court of appeals erred in declining to extend this Court's holdings authorizing

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3. We are aware of only two other trial court decisions that have addressed state regulation of Indian land use on fee lands in Indian country, and both decisions held, consistently with the holdings in this case, that such regulation could not be sustained. *See Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F. Supp. 349, 361-62 (D.R.I. 1995), *rev'd on other grounds*, 89 F.3d 908 (1st Cir. 1996); *Dunn v. Nez Perce County*, No. CV 95-00423 (2nd Jud. Dist., Idaho) (5-29-96 Opinion and Order) (CA Supp. Excerpts 65 at 28-50).

ad valorem taxation of Indian fee lands to permit county land use regulation on such lands. However, this Court itself refused to extend its property tax holdings to authorize excise taxes on the sale of Indian fee lands, and *no* court has extended those holdings to authorize wide-ranging land use regulations as advocated by Petitioner in this case. Petitioner concedes "there appears to be no federal authority" for its argument, Pet. 10, which seeks an "unprecedented extension" of existing law. Pet. App. 14a-15a.

Even if there were merit to Petitioner's argument, it would provide no basis for review in this Court. The claim that a single appellate decision erred in applying a properly stated rule of law to a novel factual setting is not sufficient grounds for *certiorari*. Moreover, Petitioner's argument lacks merit in any event; in declining to make an unprecedented extension of existing law, the court of appeals' decision did not conflict with any decision of this Court.

Likewise, Petitioner's assertion that the court of appeals erred in making a fact-bound determination that Petitioner failed to identify "exceptional circumstances" justifying county regulation does not provide a sufficient basis for granting the writ. Petitioner again seeks to extend this Court's decisions in an unprecedented manner, contending that decisions limiting tribal jurisdiction over *non-members* should be read to limit the importance of tribal self-government in a case involving jurisdiction over *tribal members*. No court has interpreted this Court's decisions in this manner.

Finally, Petitioner's concerns about land use regulation in *other, hypothetical* cases – such as cases involving mixed Indian and non-Indian landownership or development efforts,

cases in which the governing tribe has not enacted or enforced its own land use regulations, or cases involving truly extraordinary land uses such as nuclear waste repositories – are simply not presented here. Such concerns are best left to resolution by the involved tribes and affected state and local governments in the first instance and, if necessary, to further consideration by the lower courts. At this point, the nature and scope of the problem (if any) arising from on-reservation Indian development of Indian-owned fee lands and the full range of available solutions are uncertain. The very limited number of judicial decisions addressing this issue suggests that such development has not given rise to any important problems warranting intervention by the lower federal courts, much less this Court's review.[4]

I. *CERTIORARI* IS NOT WARRANTED BECAUSE PETITIONER CONCEDES THE NINTH CIRCUIT APPLIED THE CORRECT LEGAL TESTS AND THERE IS NO CIRCUIT CONFLICT.

In the lower courts, Petitioner "agree[d] that the law permits a state or local government to exercise jurisdiction over the on-reservation activities of tribe members only when doing so is expressly authorized by Congress, or when

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4. Although Petitioner asserts it has traditionally exercised jurisdiction over reservation fee lands without reference to tribal affiliation, Pet. 4, the record indicates otherwise. *See* CA Excerpts 71 at 8 (county hearing examiner has for some years taken the position that county has no land use jurisdiction over reservation fee lands owned by tribal members); CA Supp. Excerpts 65 at 27 (quite a few years ago county council, on advice of prosecuting attorney, concluded county did not have jurisdiction over fee lands owned by tribal members). The record does not reveal that this has resulted in any significant problems for the county.

'exceptional circumstances' justify the exercise of such jurisdiction." Pet. App. 24a, citing *Cabazon*, 480 U.S. at 214-16. The district court and the court of appeals applied the "express authorization" and "exceptional circumstances" tests to determine whether Petitioner could regulate Respondent Gobin's development. Pet. App. 12a-19a, 24a-30a. These are the same tests Petitioner advances here. *E.g.*, Pet. 6-7.

Petitioner does not challenge the use of these tests, but only their application to regulation of on-reservation Indian development of Indian fee lands in this case. Since Petitioner concedes that this is the first circuit court decision to address this issue, and that there is no conflict among the circuits (or state or district courts), Petitioner's assertion that the court of appeals erred in applying the correct rule of law to this particular factual setting falls far short of satisfying this Court's criteria for issuance of the writ. *See* SUP. CT. R. 10.

II. *CERTIORARI* IS NOT WARRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF THE "EXPRESS AUTHORIZATION" AND "EXCEPTIONAL CIRCUMSTANCES" TESTS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

A. "Express Authorization."

Petitioner argues that treaties and statutes authorizing the allotment of reservation lands to individual tribal members, and providing for the removal of restrictions on alienation of such lands, expressly authorize state and local governments to regulate the use and development of such lands. Petitioner also argues that the Burke Act of 1906,

which amended section 6 of the General Allotment Act and provided for the removal of "all restrictions as to sale, incumbrance, or taxation of [certain fee-patented] lands," expressly authorizes such land use regulation. Pet. 9-12.

Petitioner concedes that neither this Court nor any other court has ever so held, but contends that the court of appeals' rejection of these arguments "conflicts with the reasoning and import of *County of Yakima* and *Goudy v. Meath*, 203 U.S. 146 (1906)," two cases upholding the imposition of *ad valorem* property taxes on Indian fee lands. Pet. 10. However, in *Yakima*, 502 U.S. at 268-70, this Court itself declined to extend its property tax holding to authorize an excise tax on the sale of Indian fee lands. This case presented, for the first time, the issue whether the property tax holding should be more broadly extended to land use regulation of Indian fee lands. In the absence of any conflicting federal or state court decisions, the court of appeals' resolution of this novel issue does not warrant review in this Court.

Moreover, contrary to Petitioner's argument, the court of appeals' holding was entirely consistent with the "reasoning and import" of this Court's decisions. Citing *Goudy*'s discussion regarding alienability, Petitioner contends that

> [j]ust as it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from taxation, it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from zoning and development restrictions that apply to all other lands on the open market.

Pet. 11. However, when Congress provided for the removal of restrictions on alienation on Tulalip Reservation lands in the 1855 Treaty of Point Elliott, and when it enacted the General Allotment Act in 1887, there were no "zoning and development restrictions"; zoning regulation did not begin in this country until the turn of the century, over 45 years after the Treaty was made and over a decade after the General Allotment Act was enacted. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Moreover, unlike the *explicit* provision in the Burke Act proviso subjecting fee-patented reservation lands to taxation, there is no explicit provision in the Treaty of Point Elliott, the General Allotment Act, or any other law subjecting fee-patented reservation lands to zoning and development restrictions. And, as the Court held in rejecting the excise tax in *Yakima*, 502 U.S. at 268, the fact that Petitioner's argument may "be fully in accord with Goudy's emphasis upon the consequences of alienability" is not sufficient to sustain county regulation where such regulation is not unambiguously sustained by statutory language.

Petitioner also argues that its land use regulations are authorized "encumbrances of land" under the Burke Act. Pet. 11. However, because lands on the Tulalip Reservation were not allotted under the General Allotment Act, the Burke Act is not directly applicable here. *See United States v. Celestine*, 215 U.S. 278, 288-89, 291 (1909). Moreover, to the extent it sheds light on Congress' intent in the treaty and statutes that do apply to the Tulalip Reservation,[5] the Burke

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5. Neither the 1855 Treaty of Point Elliott nor the 1948 Act, under which restrictions on alienation were removed from the lands at issue in this case, provides for the removal of restrictions on "encumbrances" of land. *See* note 1 *supra*.

Act does not support Petitioner's argument. When the Burke Act was enacted, "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee" or "[a] claim, lien, or liability attached to property; as a mortgage, a registered judgment, etc." HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 613 (1st ed. 1891).[6] This definition does not fairly encompass general regulatory burdens, such as zoning and other land use regulations, since such regulations are not reasonably viewed as giving the state a "right to, or interest in, land," and they are not a "claim, lien or liability attached to property." Thus, it is likely that, in providing for the removal of restrictions on the "sale, taxation, or incumbrance" of land in the Burke Act, Congress intended only to authorize encumbrances such as liens, mortgages, leases and easements that would enable the fee-holders not only to sell their lands, but to convey property interests short of the full fee title. *Cf. Yakima*, 502 U.S. at 255 (noting that Congress ended the allotment era in 1934 without "impos[ing] restraints on the ability of *Indian allottees* to alienate or encumber their fee-patented lands") (emphasis added). The authorization of such encumbrances by Indian landowners is a far cry from the authorization of general regulatory burdens by state and local governments.

As *Yakima* makes clear, 502 U.S. at 268-69, even if the term "encumbrance" *could* be interpreted more broadly to encompass land use regulations, that would not be not sufficient to sustain Petitioner's position. Thus, while Petitioner notes, Pet. 11-12, that, in *Santa Rosa Band of*

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6. "Encumbrance" is defined in substantially the same way today. *See* BLACK'S LAW DICTIONARY 527 (6th ed. 1990).

Indians v. Kings County, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), the Ninth Circuit held that the prohibition on "encumbrances" in Public Law 280 included traditional land use regulations, it fails to note that the court found that the term "encumbrance" is *ambiguous* and, consistent with the Indian canons of construction, construed it to *prevent* state and local zoning regulation on trust lands. *Id.* at 667. The same canons dictate that the term "encumbrance," as used in the Burke Act, does not authorize state and local regulation of Indian-owned reservation fee lands. *See Yakima*, 502 U.S. at 269.

Moreover, as Judge Trott explained, "[d]espite the inherent ambiguity in the word 'encumbrance' standing alone, here the operative phrase is 'encumbrance *of land*.'" Pet. App. 16a (emphasis in original).

> The prepositional phrase "of land" necessarily limits the scope of permissible encumbrances. Encumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land, therefore, are not permitted.

Id., citing *Yakima*, 502 U.S. at 269. Since the county regulations at issue here do not burden the land itself, but rather the use to which Gobin seeks to put the land, they resemble the excise tax in *Yakima* and have not been expressly authorized by Congress. Pet. App. 16a-17a.

Petitioner's attempt to read the Burke Act proviso to authorize general land use regulations of fee-patented lands also suffers from the fact that, while Congress addressed general state and local regulatory authority in section 6 of

the General Allotment Act, this Court has held that those provisions do not apply to Tulalip allottees or to any Indian owners subsequent to original allottees. *See Celestine*, 215 U.S. at 288-89, 291; *Yakima*, 502 U.S. at 262. Petitioner seeks to avoid these holdings by analogizing land use regulations to the *ad valorem* property tax in *Yakima*, contending that "land use ordinances often regulate the condition of the land itself and authorize enforcement against the land without reference to persons." Pet 11. However, Petitioner does not contend that, under Washington law, liability for compliance with land use ordinances "flows *exclusively* from ownership of realty," or that such ordinances "create[] a burden on the property *alone*" – the grounds on which this Court upheld the *ad valorem* property tax. *See Yakima*, 502 U.S. at 266 (emphasis added).

It is eminently reasonable, as the court of appeals held, to view land use regulations as restrictions on the Indian's activity of using the land, just as *Yakima* viewed the real estate excise tax as a tax on the Indian's activity of selling the land. The fact that such restrictions may be *enforced* against the land, just as the real estate excise tax could be enforced against the land, does not change the result: because the restrictions limit the Indian's activity of using the land they are "void, whatever means may be devised for [their enforcement]." *Yakima*, 502 U.S. at 269.

Finally, Petitioner's argument would produce a result specifically rejected in *Yakima*, since it would validate "all sorts of state [regulation] of reservation-Indian activities" by merely targeting the regulation at the land. *Id.* For example, a state could prohibit the use of land for gaming purposes, the operation of Indian smoke shops, or other activities that this Court has held are beyond the permissible

scope of state regulation. *See Cabazon*, *supra*; *Moe*, *supra*. In rejecting such an approach in this case, the court of appeals' decision faithfully applied *Yakima* and does not conflict with any decision of this Court.

B. "Exceptional Circumstances."

Petitioner asserts that the court of appeals "misconstrues and misapplies the exceptional circumstances test" in "failing to discuss the nature of tribal sovereignty on unrestricted fee lands and by failing to discuss how County jurisdiction would impact actual federal and tribal interests in the regulation of private development on those lands." Pet. 13. Petitioner cites *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), for the proposition that tribal authority to impose zoning restrictions is diminished on reservation fee lands, and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), for the remarkable proposition that there is "no tribal interest" in development activities undertaken by tribal members on a reservation. Pet. 14-18. Petitioner then asserts that hypothetical problems that might arise from its inability to regulate development of Indian-owned fee land outweigh these allegedly diminished tribal interests. *Id.* at 19-22.

Neither *Brendale* nor *Colville* address the application of state or local land use regulations to tribal members on a reservation. In *Brendale*, the issue was tribal regulation of *non-members*, and *Colville* involved a requirement that Indian vendors collect cigarette taxes from *non-members*. This Court itself has limited the application of *Colville*, holding that it does not support state regulation of Indian gaming enterprises on a reservation. *See Cabazon*, 480 U.S. at 217-19.

Petitioner does not allege that any court has read *Brendale* or *Colville* to limit a tribe's interest in regulating the on-reservation development activities of tribal members. Further, Petitioner does not allege that the court of appeals' application of the exceptional circumstances test conflicts with the decision of any other federal or state court. Thus, even if Petitioner's interpretation of *Brendale* and *Colville* had merit, it would not warrant review in this Court. Once again, an allegation of error in a single appellate decision addressing a novel legal issue does not provide sufficient grounds for review in this Court. *See* SUP. CT. R. 10. Moreover, Petitioner's novel interpretation of *Brendale* and *Colville* lacks merit and, indeed, is in conflict with bedrock principles of this Court's Indian jurisprudence. The ability of tribal members to make their own laws and be governed by them lies at the heart of tribal self-government, and nothing in *Brendale* or *Colville* minimizes the importance of tribal self-government in this case.

Similarly, *certiorari* is not warranted to correct the lower courts' factual application of the exceptional circumstances test. The hypothetical problems identified by Petitioner were carefully considered by the lower courts, and provide no basis for overriding the important federal and tribal interests at stake here. Indeed, notably absent from the Petition (and the entire record in this case) is any suggestion that the modest development at issue here will have any material adverse impact on the county or its residents, let alone that it presents an "exceptional circumstance" warranting county regulation of the on-reservation activities of tribal members.

1. *Brendale* Does Not Support the Proposition that Tribal Jurisdiction over Tribal Members Is Diminished on Reservation Fee Lands.

Indian tribes are sovereign political entities with inherent jurisdiction over their *members* and their territory. *See, e.g.*, *Cabazon*, 480 U.S. at 207; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *United States v. Mazurie*, 419 U.S. 554, 557 (1975); *McClanahan*, 411 U.S. at 168-170; *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), the Court held tribes possess inherent sovereign power to prescribe and enforce laws applicable to tribal members, including criminal laws. No federal law has eliminated the tribes' jurisdiction over their members and the tribes have not lost this power implicitly. *Id.* at 324-26.

Although this Court has limited tribal jurisdiction over *non-members*, it has not, contrary to Petitioner's argument, diminished tribal jurisdiction over tribal members on fee lands. In *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997), the Court explained the rationale for limitations on tribal jurisdiction over non-members:

> In *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes lack criminal jurisdiction over *non-Indians*. *Montana v. United States*, [450 U.S. 544 (1981)], decided three years later, is the pathmarking case concerning tribal civil authority over *nonmembers*. . . . The Court said in *Montana* that the restriction on tribal criminal jurisdiction recognized in *Oliphant* rested on principles that support a more "general proposition." 450 U.S.

> at 565. In the main, the Court explained, "the inherent sovereign powers of an Indian tribe" – those powers a tribe enjoys apart from express provision by treaty or statute – "do not extend to the activities of *non-members* of the tribe." *Ibid.*

(Footnote omitted; emphasis added.) Significantly, as *Strate* pointed out, *id.* at 447 n.6, this limitation on tribal authority over non-members "figured prominently" in *Brendale*, where a divided court held that a tribe has authority to zone fee lands owned by *non-members* only if such lands comprise a small portion of the area in question, but not if they comprise a large portion thereof. *See* 492 U.S. at 438-47 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

In contrast to *Oliphant* and its progeny, *Wheeler* holds that tribes retain inherent sovereign authority, including *criminal* jurisdiction, over tribal members. As the Court stated in *Mescalero Apache Tribe*, 462 U.S. at 332, "[a] tribe's power to prescribe the conduct of tribal members has never been doubted. . . ." Thus, the "general proposition" derived from *Oliphant* regarding jurisdiction over non-members, which "figured prominently" in *Brendale*, has no application here.

In its most recent decision on the scope of tribal sovereignty, this Court reaffirmed the bedrock principle that tribal Indians have the right to make their own laws and be ruled by them. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). While the Court held that tribal control of land (either trust or fee land) might support tribal jurisdiction over *non-members* in some cases, it made no suggestion that land status had any bearing on tribal sovereignty and jurisdiction over

tribal members. *Id.* at 371-73; *see also id.* at 381 (Souter, J., concurring) (tribal jurisdiction "depends in the first instance on the *character of the individual* over whom jurisdiction is claimed, not on the title to the soil on which he acted") (emphasis added). In short, no decision of this Court (or any other court) restricts tribal jurisdiction over tribal members on reservation lands, regardless of the status of such lands as trust or fee lands. Petitioner's contrary and unprecedented interpretation of *Brendale* provides no basis for granting a writ of *certiorari*.[7]

2. *Colville* Does Not Minimize the Importance of Tribal Self-Government.

In 1959, in rejecting an assertion of state jurisdiction to adjudicate a civil dispute between a tribal member and a non-member which arose on a reservation, this Court held the controlling question is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Congress

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7. Because *Brendale* had no bearing on this case, there is nothing surprising about the fact that it was not cited in the court of appeals' decision. *Cf.* Pet. 15. Moreover, in suggesting that the court of appeals imposed a higher burden on Petitioner to demonstrate exceptional circumstances warranting state regulation on fee lands than trust lands, *id.*, Petitioner simply misreads the court's opinion. Petitioner conceded in the lower courts that it could not regulate the use and development of lands subject to federal restrictions on alienation, which comprise over half the reservation. Pet. App. 28a. It was entirely appropriate for the lower courts to consider Petitioner's conceded lack of jurisdiction on such lands in evaluating the interests it asserted in support of regulating unrestricted fee lands in this case. *See id.* at 18a, 28a. In considering this factor, the court of appeals did not place a higher burden on Petitioner to regulate fee as opposed to trust lands, or contravene any decision of this Court.

has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *id.*, and the Court itself has "consistently guarded the authority of Indian governments over their reservations." *Id.* at 223. Accordingly, where an assertion of state jurisdiction "would undermine the authority of the [tribe] over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," it is unlawful. *Id.*; *see also McClanahan*, 411 U.S. at 168-73.

In *Moe*, 425 U.S. at 468, the Court held Montana could not impose its cigarette taxes, personal property taxes, or vendor-licensing statutes on tribal members on the Flathead Reservation – on *fee* or trust lands – but upheld a state requirement that tribal smoke shops collect cigarette sales taxes from non-Indians. The Court found the State's interest in collecting its tax from non-Indians enjoying the State's off-reservation services sufficient to warrant the "minimal burden" imposed on the smoke shops. *Id.* at 483. It emphasized that the tax did *not* infringe on the Indians' right to make their own laws and be ruled by them, or otherwise frustrate tribal self-government. *Id.* The Court reaffirmed this holding in *Colville*, 447 U.S. at 156, 159.

In contrast, *Cabazon* held that California could not apply its gambling laws to tribal high-stakes bingo games that were open to the public and played predominantly by non-Indians. 480 U.S. at 204. The Court distinguished *Moe* and *Colville* because California's regulation would frustrate strong federal and tribal interests in tribal self-sufficiency and economic development. *Id.* at 217-19. The tribes were not "merely

marketing an exemption from state gambling laws." *Id.* at 220. Unlike the Indian cigarette vendors in *Moe* and *Colville*:

> the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Id. at 219. The Court concluded that even the State's legitimate interest in combating organized crime was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case." *Id.* at 221-22.

The court of appeals considered and fairly applied these precedents to the particular facts of this case. Pet. App. 17a-19a. The Constitution of the Tulalip Tribes was approved by the Secretary of the Interior under the Indian Reorganization Act, in which Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-[General Allotment Act] era." *Yakima*, 502 U.S. at 255. The Constitution expressly vests authority in the Tribes' governing body to regulate "the use and disposition of property upon the reservation." CA Excerpts 71 at 89. In approving the Tribes' zoning ordinance, the Bureau of Indian Affairs found it furthered the "broad purposes of federal self-determination policy in favor of establishing and supporting tribal authority to

regulate activities conducted on the reservation." *Id.* at 84.[8] The ordinance was designed to "fulfill the purposes of the Reservation as the permanent homeland of the Tulalip people." CA Excerpts 84 at 65. The particular provision at issue in this case, which permits greater residential densities than current county regulations but also requires more open space, was "required to provide adequate housing for present and future generations of Tribal members," while at the same time protecting fisheries and other vital natural resources on the Reservation. *Id.*; *see* CA Excerpts 72 at 4-5.

As the court of appeals found, Petitioner's attempt to impose its own regulations and thereby prohibit a residential development approved by the tribe "does not constitute a 'minimal burden' like the one condoned in *Moe*" and *Colville*, but instead "threatens to supplant the Tribes's Ordinances (and thus its attempt at self-government)." Pet. App. 19a. Petitioner's assertion of jurisdiction under these circumstances would interfere with the Indians' right "to make their own laws and be ruled by them," *Williams*, 358 U.S. at 220, and conflict with Congress' goal of Indian self-government.

Petitioner's assertion of jurisdiction would also be contrary to Congress' intent to preclude the extension of state laws to Indians on a reservation. *McClanahan*, 411 U.S. at 175. Having submitted subdivision and rezone applications

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8. This finding is consistent with repeated statements of this Court regarding the particular importance of tribal zoning authority. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.14 (2001) ("zoning 'is vital to the maintenance of tribal integrity and self-determination'"), *quoting Duro v. Reina*, 495 U.S. 676, 688 (1990); *Brendale*, 492 U.S. at 433 (Stevens, J.) ("[z]oning is the process whereby a community defines its essential character").

to the tribe and obtained approvals under the tribe's laws, Respondent Gobin would now be subjected to a second, overlapping and conflicting regulatory regime. This result cannot be squared with the deeply rooted policy of leaving reservation Indians free from state jurisdiction and control. *Id.* at 168.

Moreover, Respondent Tulalip Tribes showed – and Petitioner did not dispute – that the provisions under which the tribe approved the development in this case are essential to the tribe's ability to provide adequate housing on its reservation while still protecting the reservation's vital natural resources. CA Excerpts 72 at 4-5. Thus, Petitioner's assertion of jurisdiction threatens the central purposes for which the reservation was created in the Treaty of Point Elliott.

Petitioner's attempt to reduce the important federal and tribal interests in this case to the marketing of an unfair competitive advantage over non-Indian developers ignores the evidence in the record and the principles of Indian self-government that have been at the core of this Court's Indian jurisprudence. Like *Cabazon*, 480 U.S. at 219-20, this case involves the creation of substantial on-reservation value and the provision of important on-reservation services, including land use planning, zoning, permitting, inspections, housing design and construction, and utilities. Unlike *Moe* and *Colville*, the purchasers "do not simply drive onto the reservation[], make their purchases and depart," *Cabazon*, 480 U.S. at 219, but make the reservation their *home*. Because the tribe and its members "are generating value on the reservation[] through activities in which they have a substantial interest," *id.* at 220, the federal and tribal interests

here are of paramount importance. In so holding, Pet. App. 19a, the court of appeals' decision did not conflict with any decision of this Court.[9]

3. Alleged Error in the Factual Application of the Exceptional Circumstances Test Does Not Warrant *Certiorari.*

The Petition identifies no features of the development at issue in this case that would be harmful to Petitioner. Instead, it asserts that the application of the decision to other developments will create problems for states, counties and tribes. Pet. 19-22. However, the lower courts considered each of the hypothetical concerns advanced by Petitioner, and properly concluded that they do not present "exceptional circumstances" warranting county regulation of the on-reservation activities of tribal members *in this case.* This fact-bound determination does not warrant review in this Court.

Petitioner first asserts that as "a general proposition" administrative problems will result from a system in which zoning and land use jurisdiction shift between local and tribal governments based upon whether a member or non-member owns the land at any given time. Pet. 19. However, this is

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9. Petitioner's suggestion that only economic development activities undertaken by a tribe itself can further the congressional goal of Indian self-sufficiency and economic development, Pet. 16 n.4, 17 n.5, is premised on an erroneous, socialistic conception of modern Indian tribes. The entrepreneurial activities of individual tribal members, undertaken on a reservation subject to tribal regulation, can further and may well be essential to the achievement of the twin goals of Indian economic development and self-sufficiency.

the inevitable consequence of this Court's jurisprudence regarding jurisdiction on Indian reservations. *See, e.g.*, *Yakima*, 502 U.S. at 265 (noting that *Brendale* affirmed "checkerboard" with respect to zoning power over reservation *fee* land). And, as the record in this case demonstrates, any resulting administrative problems can be addressed by inter-governmental efforts to coordinate zoning and land use regulations, and to provide notice and an opportunity to comment on land use applications (such as the notice provided to Petitioner in this case). *See* Pet. App. 19a (noting "similarities between County and tribal land use regulations"); CA Excerpts 71 at 120 (Memorandum of Agreement between Petitioner and Respondent Tulalip Tribes providing for notice to "one another . . . of pre-application or other development proposals").

Second, Petitioner asserts that tribal members and non-members could engage in sham transactions to circumvent land use restrictions, and that this would be especially problematic on "reservations where the resident tribe has no land use code, or no ability to enforce its code." Pet. 19-21. Petitioner does not suggest that these circumstances are present here, and it recognizes that tribal and non-tribal governments have a mutual interest in preventing such transactions. Although Petitioner asserts that "neither a county nor a tribe may confer jurisdiction on the other by agreement," *id.* at 20, it does not explain why counties and tribes cannot work together to notify each other of potential sham transactions and take enforcement actions to prevent them.

Finally, Petitioner asserts it is difficult to determine whether a tribal member owns or has some legal interest in a particular parcel of land. Pet. 21. Again, Petitioner makes no

suggestion that it encountered any such problem in this case, and it submits an extra-record document that confirms its ability to determine tribal membership status by simply asking the tribe. *See* Pet. App. 46a (¶ 5). Since states, counties and tribes have mutual interests in insuring compliance with land use regulations, there is no reason to believe this concern cannot be addressed through cooperative inter-governmental arrangements.

Under these circumstances, the lower courts' factual determination that Petitioner did not demonstrate the existence of "exceptional circumstances" justifying a departure from "the well-established policy of leaving Indians free from state jurisdiction and control," Pet. App. 19a, 30a, does not merit review in this Court.

III. *CERTIORARI* IS NOT WARRANTED BECAUSE THIS CASE DOES NOT PRESENT A SUFFICIENTLY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT IN THE ABSENCE OF FURTHER CONSIDERATION IN THE LOWER COURTS.

As Petitioner concedes, the court of appeals' decision in this case is the first federal or state appellate decision to address state or local regulation of Indian development of Indian-owned fee lands in Indian country. Indeed, as noted above (note 3) we are aware of only two other trial court decisions that have addressed the issue, both of which concluded that such regulation could not be sustained.

The very limited amount of litigation on this narrow issue of federal Indian law counsels against plenary review in this Court at this time, particularly in a case in which the development at issue will have no material adverse impact on the county or its residents. Because tribes have limited jurisdiction over non-members, and state and local governments have limited jurisdiction over tribal members, many tribes and local governments are entering into cooperative agreements to address land use issues in Indian country. The paucity of litigation suggests their efforts have been successful in avoiding jurisdictional conflicts. In the event such conflicts do develop, they should be addressed first in the lower federal and state courts. Those courts are best equipped to consider varying patterns of land ownership, issues arising from joint Indian – non-Indian development efforts, and the consequences of particular development projects, and they are in the best position, at least in the first instance, to make fact-bound determinations of "exceptional circumstances."

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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